Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 19, 2006

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act ("FCRA") upon a finding of "reckless disregard" for FCRA's requirements, in conflict with the unanimous holdings of other circuits that "willfulness" requires actual knowledge that the defendant's conduct violates FCRA.

PARTIES TO THE PROCEEDINGS

Petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Safeco Corporation was named as a defendant in the original complaint but subsequently was voluntarily dismissed from the case by plaintiffs during the district court proceedings.

Charles Burr and Shannon Massey were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Lori Spano, Alan Opoien, Patricia McGrath, and Joan Horton were also at one time or another, and some still are, plaintiffs in the district court proceedings, but none of them participated in the court of appeals proceedings and thus are not respondents to this petition.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon state the following:

Safeco Insurance Company of Oregon is a wholly owned subsidiary of Safeco Insurance Company of America. Safeco Insurance Company of America, American States Insurance Company, and Safeco Insurance Company of Illinois are wholly owned subsidiaries of Safeco Corporation, a publicly traded company. Safeco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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Petitioners Safeco Insurance Company of America ("Safeco-America"), American States Insurance Company ("American States"), Safeco Insurance Company of Illinois ("Safeco-Illinois"), and Safeco Insurance Company of Oregon ("Safeco-Oregon") (collectively, "Safeco") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case presents a square circuit conflict on an important and recurring question of federal statutory construction. Under § 616 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), defendants can be held liable for actual damages or statutory damages of up to $1,000 per violation, punitive damages, attorney's fees, and costs for any "willful" violation of FCRA's substantive requirements. 15 U.S.C. § 1681n.[1] Unlike other federal consumer credit provisions, such as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), FCRA contains no limit on the amount of damages (actual, statutory, or punitive) that can be recovered in a consumer class action.[2] Under the settled law of all other circuits to address the issue, liability for "willful" conduct must be based upon a showing that the defendant knew that its conduct violated FCRA. In the decision below, however, the Ninth Circuit departed from this unanimous view and held that insurers, banks, and the many other businesses covered by FCRA can be held liable under § 616 in circumstances where they act with "reckless disregard" of the law's requirements.

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[1] Under § 617 of FCRA, plaintiffs' recovery for "negligent" violations is limited to actual damages plus costs and attorney's fees. 15 U.S.C. § 1681*o*.

[2] Courts have held that actual damages are not a prerequisite to recovery of punitive damages under § 616 of FCRA. *See, e.g., Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987).

The Ninth Circuit acknowledged the square conflict between its view and those of the Sixth and Eighth Circuits on this purely legal question, and noted specifically that "[t]he Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law." Pet. App. 128a n.17. In fact, the split is considerably deeper than that: eight circuits have held that "willfulness" requires actual knowledge of what the law requires, and three circuits, namely the Sixth, Seventh, and Eighth, have specifically rejected the Ninth Circuit's "reckless disregard" alternative.

Moreover, the Ninth Circuit exacerbated the split by defining "reckless disregard" in broad fashion, such that liability may be imposed on companies for failing to anticipate future judicial decisions on issues of first impression under FCRA, notwithstanding good-faith reliance on advice of counsel. In elaborating its unprecedented "reckless disregard" standard, the Ninth Circuit held that reliance on advice of counsel is "not dispositive," out of a concern that attorneys would deliberately engage in "creative lawyering that provides indefensible answers" to unresolved legal questions. *Id.* at 129a. The Ninth Circuit's broad understanding of liability under § 616 of FCRA will require companies to incur the needless and considerable expense of attempting to conform their conduct to the broadest conceivable interpretation of the statute. Importantly, moreover, the Ninth Circuit adopted this extreme interpretation in the context of a purported nationwide class action, which would potentially impose the Ninth Circuit's minority views on the operations of these defendants as to their customers *throughout the country*, effectively overruling the contrary law of other circuits.

The Ninth Circuit's decision thus threatens to impose significantly greater liability on defendants than they would face in other circuits. Indeed, this case presents a good example of the problem. Substantively, the Ninth Circuit held, in a ruling that had never been previously adopted by any court (and in fact was contrary to prior

federal court decisions), that an insurance company (or any other user of consumer information) is required to provide notice to consumers when it relies on information contained in the consumer's credit report in deciding not to offer that consumer the best possible rate in an initial policy of insurance. The Ninth Circuit so held even though the statute requires notice only where there has been "an *increase* in any charge for . . . any insurance," 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added), and, based on that language, the district court had concluded that an initial charge for insurance could not be subject to this notice requirement. Given the absence of any prior judicial guidance that notice was required in this factual circumstance, defendants' violations could not have been "knowing" and "intentional" under the standard adopted by the other eight courts of appeals that have addressed the issue. The district court's dismissal of this action would thus have been affirmed in those circuits. In conflict with those decisions, the Ninth Circuit held that defendants could still be held liable for "reckless disregard" of the law, and it remanded the case with instructions to the district court to allow an intrusive inquiry into defendants' corporate decision-making processes and advice of counsel. *See* Pet. App. 2a; *id.* at 127a-129a.

The resolution of this issue is of enormous importance to insurance companies, credit card companies, mortgage companies, and the wide range of other businesses that are subject to the requirements of FCRA. In the context of this case alone, the Ninth Circuit's dilution of § 616's willfulness standard threatens insurance companies such as Safeco with tens of billions of dollars in statutory damages, in addition to potentially enormous punitive damages and attorney's fees, for their failure to anticipate the Ninth Circuit's novel interpretation of FCRA's adverse-action notice requirement. More broadly, FCRA continues to be the subject of substantial litigation, and there is still considerable uncertainty about basic questions regarding this statute's scope. The Ninth Circuit's erroneous inter-

governing "furnishers of information"). Furnishers of information include a wide range of businesses that deal with consumer credit, including credit card companies, auto finance companies, and mortgage banking institutions. Information furnishers must, among other things, provide accurate information to credit reporting agencies; investigate disputed information from customers; and inform customers about negative information that may be put on their consumer report. *See id.*

FCRA also imposes obligations on a third category of businesses – namely, users of consumer reports. *See id.* § 1681m. Users of consumer reports include insurance companies such as Safeco, as well as consumer credit companies and employers. As relevant here, any user of consumer credit information is required by FCRA to provide "adverse action" notices to consumers when they deny credit, insurance, or employment, or take certain other adverse actions, based on information contained in a consumer report. *Id.* § 1681m(a).

2. Safeco offers a wide range of insurance products to consumers nationwide, including automobile, homeowners, renters, and small-business policies. Safeco-America is a sister company to Safeco-Illinois and American States. Safeco-Oregon is a wholly owned subsidiary of Safeco-America. All four insurance companies are wholly owned subsidiaries of Safeco Corporation, a publicly traded holding company. All of the companies operate independently and have separate boards of directors. *See* Pet. App. 17a.

On October 2, 2001, plaintiff Lori Spano filed a purported nationwide class action against Safeco Corporation for alleged violations of § 615 of FCRA, which requires "any person" to provide notice to a consumer if that person "takes any adverse action with respect to [that] consumer that is based in whole or in part on any information contained in a consumer report." 15 U.S.C. § 1681m(a). Spano alleged that Safeco Corporation took adverse actions against her and others similarly situated

with respect to the underwriting of insurance as a result of information contained in their consumer credit reports, without providing them with the notice required by § 615. *See* Pet. App. 23a. The complaint alleged no actual damages, but sought statutory damages, punitive damages, and attorney's fees. *See id.* at 4a, 26a.

As to herself, Spano claimed that she purchased an automobile insurance policy from Safeco National Insurance Company that was subsequently endorsed to Safeco-Oregon. The policy was cancelled four times for failure to pay the premium; each time, it was reinstated by Safeco-Oregon without reference to any consumer credit information. After the policy was cancelled for a fifth time, Spano requested that Safeco-Oregon reinstate it yet again. Safeco-Oregon declined to do so, based in part on information contained in a consumer credit report. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA entitling her to notice. *See id.* at 4a, 5a.

Spano later added other named plaintiffs, including respondents Massey and Burr. *See* S.E.R.[3] 1-5. Burr applied for automobile insurance in July 2001, and he was issued a policy by American States. *See* Pet. App. 4a. American States underwrote the policy through InsurQuest, a program designed for high-risk drivers. *See* E.R. 4. InsurQuest places drivers into one of five pricing tiers, designated A through E, based on the totality of the driver's underwriting characteristics. *See id.* Burr was placed in Tier D, mainly because of his poor driving record. *See id.* Although his consumer credit information was consulted in placing him in Tier D, even the most favorable credit score would not have improved his tier placement and his premium would not have changed. *See id.*; Pet. App. 4a. After the American States policy lapsed for failure to pay premiums on July 7, 2002, Burr pur-

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[3] References to "E.R." and "S.E.R." are to the Excerpts of Record and Supplemental Excerpts of Record, respectively, filed in the court of appeals.

chased a new policy from Safeco-Oregon, which relied on information in Burr's consumer credit report in setting the amount of Burr's initial premium. *See* Pet. App. 4a-5a.

Massey applied for renters insurance from Safeco-Illinois in January 2001. Safeco-Illinois has three tiers of renters insurance. Safeco-Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Based on the totality of the circumstances relevant to her application, Safeco-Illinois placed Massey in a tier with a higher premium rate. *See id.* at 4a.

After Burr and Massey were added as plaintiffs, plaintiffs voluntarily dismissed Safeco Corporation as a defendant and instead substituted Safeco-America. Safeco-America moved to dismiss on the ground that the policies purchased by the three named plaintiffs were not issued by Safeco-America, but by its affiliates, Safeco-Oregon, Safeco-Illinois, and American States ("the Issuing Companies"). In an opinion and order dated April 21, 2003, the district court granted Safeco-America's motion for summary judgment, holding that only a person who contracts with the insured can take an "adverse action" under 15 U.S.C. § 1681m(a). *See id.* at 20a-22a. The district court also granted plaintiffs' motion to file a Fourth Amended Complaint substituting the Issuing Companies as defendants. *See id.* at 34a.

As relevant to plaintiffs' claims, FCRA defines "adverse action" to mean "a denial or cancellation of," or "an increase in any charge for," any insurance. *Id.* § 1681a(k)(1)(B)(i). On March 3, 2004, the district court granted the Issuing Companies' motion for summary judgment against Burr and Massey on the ground that no "adverse action" had been taken against either of them. Pet. App. 11a-12a. Relying on its previous decision in *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1316-17 (D. Or. 2003), which was the only reported decision to address the question, the district court agreed with the Issuing Companies that the "common and ordinary meaning of

§ 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it 'makes greater,' i.e., 'increases,' the price previously demanded of the insured for insurance." Pet. App. 11a (internal quotation marks omitted). Accordingly, the district court held that that section "unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report." *Id.* at 11a-12a (internal quotation marks omitted); *see also Mark*, 275 F. Supp. 2d at 1317 (FCRA "reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report"). The district court thus dismissed the claims of Burr and Massey because neither had existing policies with the issuing company at the time they applied for insurance. Pet. App. 12a.

As to plaintiff Spano, however, the district court denied the Issuing Companies' motion for summary judgment. The district court held that Spano's "request for reinstatement" of her previously cancelled policy was an "application for insurance" that was "denied" by Safeco-Oregon on the basis of information in her consumer credit report, triggering FCRA's notice requirement. *Id.* at 12a-13a.

3. After the district court entered final judgment against plaintiffs Burr and Massey under Federal Rule of Civil Procedure 54(b), they appealed. The Ninth Circuit reversed the grant of summary judgment to the Issuing Companies, based on the reasoning in its concurrently filed decision in *Reynolds* and *Edo*. Whereas the district court had concluded that the meaning of "increase" "unambiguously" required an additional charge for a preexisting policy, and thus could not apply to a "single initial charge for the insurance coverage," Pet. App. 11a-12a, the Ninth Circuit concluded that the "clear" and "ordinary meaning" of "increase" covered "a charge that is higher

than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price," *id.* at 114a-117a. *See id.* at 1a-2a.

Again relying on *Reynolds* and *Edo*, the Ninth Circuit also rejected the Issuing Companies' alternative ground for affirmance – namely, that their conduct was not "willful," and therefore could not give rise to civil liability under § 616 of FCRA. The Ninth Circuit held that a "willful" violation of FCRA could be established if a company performs an act that in fact violates FCRA "either knowing that the action violates the rights of consumers or in reckless disregard of those rights." *Id.* at 128a-129a; *id.* at 2a. Under this standard, the Ninth Circuit opined that "unlikely answers to 'issues of first impression'" could be the basis of a finding of "reckless disregard" for FCRA's requirements, even where those answers were based on advice of counsel. *Id.* at 128a. The Ninth Circuit acknowledged that its holding was at odds with that of the Sixth and Eighth Circuits, both of which have rejected a "reckless disregard" standard and require "actual knowledge with regard to the law." *Id.* at 128a n.17.

Finally, the Ninth Circuit also reversed the district court's grant of summary judgment to Safeco-America based on its holding in *Reynolds* and *Edo* that a company need not have issued an insurance policy to have taken an "adverse action" requiring notice under FCRA. *See id.* at 2a; *id.* at 122a-125a.

In its initial opinion in *Reynolds* and *Edo* dated August 4, 2005, the Ninth Circuit panel was divided on the proper disposition of the case. The panel majority, consisting of Judge Reinhardt and Judge Berzon, not only reversed the district court's grant of summary judgment to the defendant companies, but effectively granted summary judgment to the plaintiffs, despite the fact that the plaintiffs had never requested such relief. The panel majority opined that the companies' interpretation of the meaning of "adverse action" was "not reasonable," "objectively unmeritorious," and thus "in reckless disregard of the con-

sumers' statutory rights." *Id.* at 64a-66a. Judge Bybee dissented, stating that he would remand the case because he "[could not] conclude on the basis of the record before [him] that the companies' actions . . . were so 'objectively unmeritorious' . . . that [the court] [could] decide their willfulness . . . without the benefit of findings of fact." *Id.* at 68a.

Upon petition for rehearing and rehearing *en banc*, the panel issued a modified opinion on October 3, 2005.[4] The panel majority's modified opinion merely altered several phrases in the initial opinion – for example, replacing the characterizations "unreasonable" and "not reasonable" with "indefensible" and "untenable," and "objectively unmeritorious" with "plainly unmeritorious." *Id.* at 96a-97a. In response, Judge Bybee expanded his dissent. He stated that, on the record before him, he would "not find that the companies willfully failed to comply with FCRA as a matter of law." *Id.* at 100a. Although Judge Bybee agreed with the majority that the district court's interpretation of § 1681a(k)(1)(B)(i) was incorrect, he could not conclude that "the district court's conclusion, like the companies' position, was also untenable." *Id.*

After a second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006. This time, the panel acceded to Judge Bybee's disposition of the case. Instead of effectively granting summary judgment to the plaintiffs on the ground that the defendants' conduct was willful as a matter of law, the court remanded the case for the district court to apply the "reckless disregard" standard in the first instance. *See id.* at 129a. In so doing, the court revised its opinion to conclude only that "some" of the defendants' interpretations of FCRA were "implausible," and

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[4] The panel amended its October 3, 2005 opinion *sua sponte*, in an unpublished order issued on October 24, 2005. That amendment affected only footnote 7 and was incorporated into the October 3 opinion reported at 426 F.3d 1020 (reproduced at Pet. App. 69a-101a).

it instructed that, on remand, the "willfulness" inquiry should depend on "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The Ninth Circuit rejected the companies' contention that their reliance on advice of counsel negated a "reckless disregard" finding, on the ground that such a holding would "create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a.

The defendants in *Reynolds* and *Edo*, as well as the Issuing Companies, filed for rehearing and rehearing *en banc* on February 14, 2006. On April 20, 2006, the Ninth Circuit denied *en banc* review. *See id.* at 36a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for two reasons. First, as the Ninth Circuit acknowledged, its holding creates a split among the circuits on a pure question of law: the level of intent necessary for civil liability under § 616 of FCRA. Eight courts of appeals have held that civil liability for willful violations under § 616 requires that the defendant act "knowingly," "intentionally," or with "conscious disregard" of the law. This standard has always required actual knowledge that one's acts violate FCRA. Moreover, the Sixth, Seventh, and Eighth Circuits have correctly and specifically held that mere "reckless disregard" of the law's requirements does not constitute a "willful" violation under this standard. The Ninth Circuit's "reckless disregard" standard thus represents a significant and unwarranted departure from these longstanding precedents.

If the decision below is allowed to go unreviewed, nationwide class actions seeking statutory and punitive damages for "willful" violations of FCRA will undoubtedly be filed in the Ninth Circuit, effectively nullifying the considered opinions of eight other circuit courts and making

the Ninth Circuit's decision the law of the land. Indeed, since the decision below was issued, numerous nationwide class actions, often with named plaintiffs residing in other circuits, have already been filed under § 616 of FCRA in district courts in the Ninth Circuit.[5] The need for review of this clear and acknowledged circuit split is thus especially compelling.

Second, the question presented is of enormous practical importance to the broad range of American businesses that are regulated by FCRA and, in particular, national companies that will inevitably be subject to nationwide consumer class actions brought in the Ninth Circuit. Under the standard set forth in the decision below, reliance by businesses on opinions by counsel that are later deemed "implausible" by an appellate court "may constitute reckless disregard for the law and therefore amount to a willful violation of the law," even where there is no judicial guidance as to the relevant legal issue at the time of the defendants' conduct or, as in this case, there are subsequent judicial opinions vindicating the defendants' actions. *See* Pet. App. 129a. If that ruling is allowed to stand, companies will be forced into the untenable position of second-guessing their counsel's legal advice, or else risk potentially enormous statutory and punitive damages. Moreover, they will be forced to incur significant costs to protect themselves against the broadest possible interpretations of FCRA, even though those interpretations have not, as yet, been adopted by any court and may even, as was the case here, be contrary to lower court interpretations. The decision correspondingly invites intru-

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[5] *See, e.g., Vann v. Lewis Hastie Receivables Inc.*, No. 06-CV-95 (S.D. Cal. filed Jan. 17, 2006) (California named plaintiff); *Newman v. Capital One Servs., Inc.*, No. 05-CV-5409 (N.D. Cal. filed Dec. 29, 2005) (Colorado named plaintiffs); *Luther v. 1-800-BAR NONE*, No. 05-CV-4026 (N.D. Cal. filed Oct. 5, 2005) (Illinois named plaintiff); *Hogan v. PMI Mortgage Ins. Co.*, No. 05-CV-3851 (N.D. Cal. filed Sept. 23, 2005) (Texas and Georgia named plaintiffs); *Putkowski v. Irwin Home Equity Corp.*, No. 05-CV-3289 (N.D. Cal. filed Aug. 12, 2005) (Florida named plaintiff).

sive factual investigation into the attorney-client relationship – a result that FCRA's willfulness standard was designed to avoid – without even any assurance that a good-faith opinion of counsel will preclude liability. It thus provides the worst of all worlds to the many businesses that are potential FCRA defendants.

I. THE DECISION BELOW CONFLICTS WITH LONGSTANDING JUDICIAL INTERPRETATION OF FCRA'S WILLFULNESS REQUIREMENT

A. The Decision Below Conflicts with the Precedents of At Least Three Other Courts of Appeals, Which Have Specifically Rejected the Ninth Circuit's "Reckless Disregard" Standard

Three federal courts of appeals have, in square conflict with the decision below, recognized that a "willful" violation of FCRA must be committed with knowledge of what the law demands, and that reckless disregard for the law is insufficient to support civil liability under § 616.

In *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), the Eighth Circuit examined "what state of mind amounts to willfulness" under § 616 in a case alleging that the defendants obtained the plaintiff's credit report for an impermissible purpose in violation of 15 U.S.C. § 1681b(f). *Id.* at 368. Reviewing its own circuit precedent, the court noted that it had previously held that, "[t]o show willful noncompliance with the FCRA, [the plaintiff] must show that [the defendant] knowingly and intentionally committed an act in conscious disregard for the rights of others." *Id.* (citing *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (willfulness requires that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others")) (internal quotation marks omitted; alterations in original). Examining this requirement, the court stated that "[t]he statute's use of the word 'willfully' imports the requirement that the defendant know his or her conduct is unlawful." *Id.* It thus concluded that "willful noncompliance under section [616]

requires knowing and intentional commission of an act the defendant knows to violate the law." *Id.* at 370. The court also specifically rejected the contention – accepted by the Ninth Circuit in the decision below – that "recklessness is equivalent to willfulness under section [616]." *Id.* at 369.

In *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998), the Sixth Circuit similarly held that civil liability for "willful noncompliance" requires that "the party acted knowingly and willfully." *Id.* at 429. On this basis, the court held that defendants "cannot be held civilly liable" for obtaining a consumer credit report for an improper purpose, in violation of 15 U.S.C. § 1681b, "'under what is believed to be a proper purpose under the statute but which a court . . . later rule[s] to be impermissible legally under § 1681b.'" *Id.* (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (Wellford, J., concurring)) (alterations in original); *accord Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005) (for plaintiff to be eligible for punitive damages under § 616, "the defendant must have committed a willful violation by knowingly and intentionally committing an act in conscious disregard for the rights of others"). The Sixth Circuit's decision in *Duncan* is at odds with the Ninth Circuit's holding below that defendants *can* be held civilly liable for "willful noncompliance," notwithstanding the lack of any judicial decision establishing FCRA's applicability to initial policies of insurance, and therefore the lack of any knowledge that its failure to provide notice was in violation of § 615.

Likewise, the Seventh Circuit in *Wantz v. Experian Information Solutions*, 386 F.3d 829 (7th Cir. 2004), held, in agreement with the Eighth Circuit's decision in *Phillips*, that, "[t]o act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'" *Id.* at 834 (quoting *Phillips*, 312 F.3d at 368) (second alteration in original); *accord Ruffin-Thompkins v. Experian*

Info. Solutions, Inc., 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz*). The requirement that the defendant "be conscious" that its act is unlawful is also inconsistent with the Ninth Circuit's "reckless disregard" standard.[6]

Had this case been heard in any of these other three circuits, the district court's decision granting summary judgment to defendants would have been affirmed. As a matter of law, defendants could not have known that they were violating FCRA's notice provisions given the absence of a single judicial opinion in the 35 years since FCRA's passage holding that these provisions are triggered in the context of initial policies for insurance and, further, given the fact that defendants' legal position on that question was later adopted in multiple district court decisions. *See, e.g., Stevenson v. TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993) (because "[t]here was no prior guidance to suggest that [defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights"). The Ninth Circuit's decision is thus in square conflict with the decisions of the Sixth, Seventh, and Eighth Circuits.

B. Five Other Circuits Have Also Held That "Willfulness" Requires "Knowing" or "Conscious" Disregard of the Law

The decisions of the Sixth, Seventh, and Eighth Circuits are in accord with the decisions of every other court of appeals to address the *mens rea* required under § 616 – including the Second, Third, Fourth, Fifth, and Tenth Circuits. Each of these courts has stated that "willfulness"

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[6] Indeed, the decision below is at odds with the decision of another panel of the Ninth Circuit in an unreported case. *See Arriola v. Safeco*, No. 92-35321, 1993 WL 530480 (9th Cir. Dec. 21, 1993) (judgment noted at 15 F.3d 1082). As that panel wrote, "[t]he willfulness requirement under [§ 616] is synonymous with the requirement of 'intent' in criminal statutes," which requires knowledge and specific intent to commit an unlawful act. *Id.* at *1 (affirming the district court's grant of judgment to defendants as a matter of law).

requires "knowingly and intentionally" committing an act in "conscious" or "deliberate and purposeful" disregard of the statutory requirements of FCRA. In the words of the Fourth Circuit, "[t]o prove willfulness under [§ 616 of FCRA], [p]laintiffs must 'show that the defendant knowingly and intentionally committed an act in conscious disregard for the rights of the consumer.'" *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003) (quoting *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001)); *see Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001) ("[t]o show willful noncompliance, a plaintiff must show that a defendant 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Bakker*, 152 F.3d at 1013); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) ("[t]o show willful noncompliance with the FCRA, [a plaintiff] must show that defendants 'knowingly and intentionally committed an act in conscious disregard for the rights of others'") (quoting *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986));[7] *Stevenson*, 987 F.2d at 293 ("To be found in willful noncompliance, a defendant must have 'knowingly and intentionally committed an act in conscious disregard for the rights of others.'") (quoting *Pinner*, 805 F.2d at 1263); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.

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[7] The Ninth Circuit purported to follow the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997). In that case, the Third Circuit panel reiterated its prior holding in *Philbin* that willful noncompliance requires that a defendant "'knowingly and intentionally committed an act in *conscious* disregard for the rights of others.'" *id.* at 226 (quoting *Philbin*, 101 F.3d at 970) (emphasis added), but it then proceeded to state, without explanation for the change, that Trans Union could be liable for punitive damages under § 616 if it acted "knowing [its actions] to be in contravention of the rights possessed by consumers pursuant to FCRA or in *reckless* disregard of whether" its actions were lawful. *id.* at 227 (emphasis added). In light of its recitation of the prior holding in *Philbin*, which clearly requires actual knowledge, the *Cushman* opinion cannot plausibly be said to hold that "reckless disregard" satisfies the "willfulness" standard under § 616.

2001) (same); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002) ("For [a] violation to be 'willful,' . . . a defendant's course of conduct must exhibit a 'conscious disregard' for or entail 'deliberate and purposeful' actions taken against a plaintiff's rights.") (quoting *Cousin*, 246 F.3d at 372); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam) (liability under § 616 must be predicated on a finding that defendant acted "willfully and knowingly").

The requirement that the defendant act "knowingly and intentionally" and in "conscious" or "deliberate and purposeful" disregard plainly entails an intentional refusal to abide by known legal requirements. As the Eighth Circuit explained in *Phillips*, "[u]nder this formulation the defendant must commit the act that violates the [FCRA] with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others." 312 F.3d at 368. Indeed, whenever these circuits have applied the *mens rea* requirement of § 616 to the facts of a particular case, they have inquired whether there was evidence showing that the defendant knew that his conduct violated the law. *See, e.g., Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (rejecting plaintiffs' Rule 60(b) motion because proffered evidence "does not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA") (citing *Pinner*, 805 F.2d at 1263); *Yohay*, 827 F.2d at 972 & n.8 (upholding jury's verdict for plaintiff under § 616 only after finding "considerable evidence" that defendant credit union "consciously ignored" plaintiff's rights because its manager "acted purposefully and with full knowledge of what she was doing"); *Zamora*, 811 F.2d at 1370-71 (affirming jury verdict of willful violation under § 616 because trial testimony indicated that bank employees "knew the permissible purposes for obtaining consumer reports" and "knew they could not ac-

cess the records of a spouse when checking the credit of an individual").

The split among the circuits is thus wide and well developed. Eight circuit courts have held that "willfulness" requires a knowing or intentional violation, and three circuits have specifically rejected the Ninth Circuit's "reckless disregard" standard. Only the First, Eleventh, and D.C. Circuits have not expressed a view on the issue.[8] There is no indication that this division will be resolved with further percolation. Moreover, given plaintiffs' ability to file nationwide class actions in the Ninth Circuit, absent review by this Court, the Ninth Circuit's decision, though adopted by no other court, is likely to become controlling for a large percentage of FCRA litigation.

C. The Court of Appeals' Rejection of the Decisions of Its Sister Circuits Was Premised on Reasoning That Conflicts with This Court's Precedents on the Meaning of "Willfulness"

In deviating from the precedents of the other circuits, the Ninth Circuit erroneously relied on this Court's interpretation of the term "willful" in two separate provisions of two other statutes: the liquidated damages provision of

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[8] District courts in these circuits are divided on the issue as well. *Compare Veno v. AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Mass. 2003) (Gertner, J.) ("Actions showing a 'reckless indifference' to plaintiff's rights under the FCRA can also constitute willfulness.") (citing *Barron v. Trans Union Corp.*, 82 F. Supp. 2d 1288, 1298 (M.D. Ala. 2000)), *with Graziano v. TRW, Inc.*, 877 F. Supp. 53, 56 (D. Mass. 1995) (Lindsay, J.) ("[U]nder FCRA, '[t]o constitute willful noncompliance, a party must have "knowingly and intentionally committed an act in conscious disregard for the rights of others."'") (quoting *Pinner*, 805 F.2d at 1263) (second alteration in original). *See also, e.g., Jordan v. Trans Union LLC*, No. 05-CV-305, 2006 WL 1663324, at *7 (N.D. Ga. June 12, 2006) ("Willful noncompliance requires a defendant to knowingly and intentionally commit an act in conscious disregard for the rights of others.") (citing *Cousin*, 246 F.3d at 372); *Jordan v. Equifax Info. Servs., LLC*, 410 F. Supp. 2d 1349, 1354 (N.D. Ga. 2006) ("A willful violation 'requires knowing and intentional commission of an act the defendant knows to violate the law.'") (quoting *Phillips*, 312 F.3d at 370).

ness" if an appeals court ultimately finds the defendants' legal judgment "implausible" even in the face of advice of counsel and prior district court precedent vindicating that position – finds no analogue in any Supreme Court decision interpreting such statutory language, regardless of context. The Ninth Circuit's extraordinary holding that courts must look behind lawyers' good-faith professional advice in order to prevent companies from "employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression'" (Pet. App. 128a) is a stark departure from this Court's precedents, which have never authorized such an invasive inquiry into lawyers' work product or their relationships with their clients. On the contrary, even in the very different context of the ADEA, this Court concluded that a company's actions could not have been willful *as a matter of law* where it "sought legal advice," even though the attorneys "overlooked" the key issue. *Thurston*, 469 U.S. at 130; *see id.* at 129 (company acted "reasonably and in good faith" where it consulted with lawyers to determine lawfulness of existing policy); *see also Ratzlaf v. United States*, 510 U.S. 135, 142 n.10 (1994) ("willful" violation of the federal antistructuring laws "might be negated by, *e.g.*, proof that defendant relied in good faith on advice of counsel"). The Ninth Circuit's refusal to recognize an advice of counsel defense under § 616 rests on a presumption of bad faith on the part of both lawyers and clients that is unprecedented in the decisions of this Court.

The Ninth Circuit's extreme reading is particularly inappropriate in the context of FCRA, which Congress made clear was intended to require that "consumer reporting agencies adopt *reasonable* procedures" for ensuring the accuracy of consumer reports. 15 U.S.C. § 1681(b) (emphasis added). By construing the "willfulness" provision to encompass an extremely lax notion of "reckless disregard," the Ninth Circuit's rule forces businesses to adopt unnecessary and unreasonable compliance measures in

the face of legal uncertainty, simply to guard against the risk of enormous statutory and punitive liability in the case of a finding of "reckless" disregard.

As this Court has repeatedly stated, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943); *see also United States v. Murdock*, 290 U.S. 389, 394 (1933); *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality). Given the legislative history and purpose behind FCRA, and the starkly different circuit precedent interpreting § 616, the Ninth Circuit's adoption (and subsequent distortion) of the "reckless disregard" standard from the ADEA and FLSA contexts is at odds with this Court's repeated warnings against reflexively transferring the meaning of the term "willful" in one statute to a different statutory context. This Court should grant certiorari to resolve the proper meaning of the term "willful" in the distinct context of FCRA, as it has done in numerous other statutory contexts. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131 (1988) (certiorari granted to resolve a circuit split on the meaning of "willful" in the FLSA); *Thurston*, 469 U.S. at 125 (certiorari granted to interpret the term "willful" in the ADEA); *Murdock*, 290 U.S. at 391-93 (certiorari granted to review whether court properly instructed jury on willfulness requirement under § 1114(a) of the Revenue Act of 1926 and § 146(a) of the Revenue Act of 1928); *Spies*, 317 U.S. at 493 (certiorari granted to review jury instruction on the term "willful" in § 145(a) of the Revenue Act of 1936).

II. THE QUESTION PRESENTED IS OF ENORMOUS PRACTICAL SIGNIFICANCE

The issue in this case is of great significance to businesses throughout the country that are subject to regulation under FCRA. In the context of this case alone, the Ninth Circuit's decision subjects insurance companies nationwide to potential statutory damages of up to $1,000, along with punitive damages and attorney's fees, for their failure to predict the Ninth Circuit's unprecedented hold-

ing that adverse-action notices must be sent to every initial purchaser of insurance who hypothetically could have received a lower premium but for information in their credit report. Since 2001, the insurance industry has issued more than 150 million new policies. *See* Brief for Amici Curiae the American Insurance Association *et al.* in Support of Defendants' Petitions for Rehearing En Banc at 15-16, Nos. 03-35695 & 04-35279 (9th Cir. filed Feb. 24, 2006). If even half of these policies were issued without a required notice, statutory damages alone could exceed $75 billion. *See id.* at 16 & n.7.[9] As noted above, FCRA, unlike other federal consumer protection statutes, puts no statutory cap on class-action damages.

Beyond the context of FCRA's adverse-action notice requirement, moreover, the Ninth Circuit's decision will subject American businesses to potentially enormous liability. As discussed above, FCRA regulates a wide range of companies in the field of consumer banking and finance, from "consumer credit agencies" (such as Experian, Trans Union, and Equifax), "furnishers of information" (including banks, credit card companies, mortgage companies, and consumer finance companies), and "users of information" (including not only credit and insurance companies, but also employers nationwide). If the decision below is allowed to stand, such businesses will be subject to civil liability, including statutory and punitive damages, in many cases where the requirements of FCRA have not been interpreted by any court and, as a result,

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[9] The adverse-action notice requirement affects far more than just insurance companies. FCRA's definition of "adverse action" makes clear that notices are required in a variety of contexts spanning a broad array of commercial transactions: extension of credit (15 U.S.C. § 1681a(k)(1)(A)), policies of insurance (*id.* § 1681a(k)(1)(B)(i)), employment decisions (*id.* § 1681a(k)(1)(B)(ii)), and granting of government licenses and benefits (*id.* § 1681a(k)(1)(B)(iii)). In addition, FCRA contains a "catch-all" provision broadly including any other "adverse" action "made in connection with an application" or "a transaction that was initiated by" a consumer. *Id.* § 1681a(k)(1)(B)(iv).

those businesses lack the *mens rea* required by Congress in § 616.

Although FCRA was passed more than 35 years ago, it has been amended several times in the last decade (*see supra* pp. 5-6), and courts continue to grapple with novel questions in interpreting its provisions. The case below addressed two issues that had not previously been addressed by any other court of appeals: (1) whether FCRA's notice requirement for "adverse actions" applies to initial policies of insurance; and (2) whether a company may be held liable for failure to issue an "adverse action" notice to a consumer when that company did not issue the relevant insurance policy. *See* Pet. App. 113a-117a, 122a-125a. On each question, the panel interpreted the substantive scope and requirements of FCRA for the first time. Moreover, even as it addressed these questions, the panel acknowledged that it was leaving unanswered another important and related question – namely, what specific information companies must include in any notice required by FCRA.[10]

Indeed, issues of first impression, as well as issues where courts are in conflict, are common under FCRA. For example, there is a split of authority as to whether the 1996 amendments to FCRA provide a private cause of action to consumers against furnishers of credit information. *See Sheffer v. Experian Info. Solutions, Inc.*, 249 F. Supp. 2d 560, 562 (E.D. Pa. 2003) (citing divided authorities). Issues pertaining to FCRA's substantive requirements also remain unresolved. For example, various Federal Trade Commission ("FTC") opinion letters suggest

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[10] In addition to erroneously expanding FCRA's notice requirement by holding that a required notice must, "at a minimum," "communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action," the decision below expressly left open the possibility that FCRA requires "a fuller description of what specific information was adverse." Pet. App. 121a & n.14.

that outside law firms that conduct internal investigations into the conduct of company employees on behalf of their corporate clients may qualify as "consumer reporting agencies," with all the attendant obligations under FCRA, *see, e.g.*, Letter from Robert Pitofsky, Chairman, FTC, to Rep. Pete Sessions (Mar. 31, 2000), *available at* http://www.ftc.gov/os/2000/03/ltrpitofskysessions.htm; Letter from Christopher W. Keller, FTC, to Judi A. Vail (Apr. 5, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/vail.htm, while several district courts have questioned the persuasiveness of this broad interpretation. *See, e.g., Hartman v. Lisle Park Dist.*, 158 F. Supp. 2d 869, 875-77 (N.D. Ill. 2001); *Johnson v. Federal Express Corp.*, 147 F. Supp. 2d 1268, 1272 (M.D. Ala. 2001). Other issues abound.[11] On these and other unresolved questions, the Ninth Circuit's holding threatens to impose enormous liability on companies despite the fact that there has been no guidance from the courts as to FCRA's underlying requirements. And, in the class-action context, companies operating nationwide will now be held hostage to the Ninth Circuit's ruling even as to conduct occurring in circuits that have explicitly rejected that ruling. *See supra* note 5.

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[11] *See, e.g., Nunnally v. Equifax Info. Servs., LLC*, No. 05-12029, 2006 WL 1562100, at *3-*7 (11th Cir. June 9, 2006) (holding, as a matter of first impression, that a post-reinvestigation consumer report required by 15 U.S.C. § 1681i(a)(6)(B) does not require disclosure of the consumer's entire file and reversing the district court's contrary conclusion); *Matthiesen v. Banc One Mortgage Co.*, 173 F.3d 1242, 1244-45 (10th Cir. 1999) (holding, as a matter of first impression, that FCRA does not require a mortgage company to disclose to a mortgage applicant the fact that the denial of his application was based in part on information obtained from the applicant's tax returns); *DiGianni v. Stern's*, 26 F.3d 346, 348-49 (2d Cir. 1994) (per curiam) (resolving issue of first impression as to whether retail department stores are consumer reporting agencies); *Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1173-74 (5th Cir. 1993) (per curiam) (issue of first impression as to the definition of "consumer report").

The "reckless disregard" standard adopted by the Ninth Circuit will also invite intrusive inquiry into the decision-making processes of American businesses, and in particular into the legal advice given to those businesses by their counsel. According to the decision below, to rebut a finding of recklessness, companies will be required to set forth "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 129a.

What is more, making such a showing may not even be enough under the Ninth Circuit's view. According to the decision below, even a reasonable effort to determine what the law requires may not be sufficient to avoid liability if a court later determines that the legal position taken by the company is "implausible." *Id.* at 129a. In virtually all cases, companies will thus be faced with the Hobson's choice of either divulging attorney-client privileged communications or forfeiting their intent-based defense under § 616, all without any guarantee that a showing of subjective good faith will successfully forestall liability.

In the end, the Ninth Circuit's relaxed standard for "willfulness" will impose enormous costs on businesses that are subject to FCRA's regulations. Under the Ninth Circuit's rule, companies in Safeco's position would have no choice but to take the most expansive possible interpretation of FCRA's requirements, resulting in enormous compliance costs, even where that interpretation is unlikely to be correct. Otherwise, companies would risk facing potentially enormous statutory damages, attorney's fees, and costs, as well as possible punitive damages, which would ensue under § 616 if they are mistaken.[12]

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[12] As the reported cases illustrate, the award of punitive damages and attorney's fees and costs often dwarfs the amount of actual damages. *See, e.g., Sheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 553 (E.D. Pa. 2003) (award of $25,000 in attorney's fees and more than $7,500 in costs for claim valued at $1,000); *Bakker*, 152 F.3d at 1009 (affirming award of $500 in compensatory damages and $5,000 in punitive damages).

This Court should grant certiorari to clarify whether these serious and undesirable consequences are consistent with the definition of "willfulness" uniformly adopted by the other circuits.

There is no reason to postpone consideration of the proper interpretation of § 616 in this case. The issue is a pure question of law that will be unaffected by any proceedings on remand. Because it is undisputed that there was no contemporaneous judicial guidance interpreting "adverse action" to cover initial rates for insurance, and, further, that the Ninth Circuit's decision reversed prior district court decisions vindicating defendants' legal position, there can be no doubt that defendants' failure to provide notice was not a "knowing" or "purposeful" violation of law. *See Stevenson*, 987 F.2d at 296. Should the Ninth Circuit's interpretation of § 616's "willfulness" prerequisite be reversed, therefore, there would be no need for a remand. Nor would the harms to Safeco disappear if it ultimately persuaded the district court on remand that it did not act in "reckless disregard" of the law under the Ninth Circuit's adopted standard. As noted, the Ninth Circuit's approach forces defendants to assume that all FCRA cases will be brought under the Ninth Circuit standard and to undertake the significant expense necessary to accord their actions to the broadest possible understanding of that statute, even if that interpretation has not yet been adopted by any court. The Court should grant review to confirm, as all of the other courts of appeals have held, that "willful" violations of FCRA must be done with knowledge of the law's demands, and thereby to spare businesses throughout the country from the severe burden of incalculable punitive and statutory damages for failure to anticipate the later judicial resolution of issues of first impression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 19, 2006

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

LORI SPANO, ET AL.,
Plaintiffs,
AND

CHARLES BURR, ET AL.,
Plaintiffs-Appellants,

v.

SAFECO CORPORATION, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Decided Aug. 4, 2005]

MEMORANDUM*

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

Plaintiffs[1] appeal from the district court's grant of summary judgment to all defendants. First, with regard to SAFECO Insurance Company of Oregon, SAFECO Insurance Company of Illinois, and American States Insurance Company, the district court granted summary judgment on the ground that, under the Fair Credit Reporting Act

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] We note that plaintiff Lori Spano is not a party to this appeal.

("FCRA"), in cases involving an initial policy of insurance a "single initial charge for the insurance coverage" cannot give rise to an "increase in any charge" under FCRA. In light of *Edo v. GEICO Casualty Co.*, No. 04-35279, we reverse that holding and remand. Second, with respect to SAFECO Insurance Company of America, the district court reasoned "only the entities that contracted with the Plaintiffs and issued their policies could deny, cancel, increase the charge for, or reduce or change the terms of Plaintiffs' insurance." Again we reverse in light of *Edo*. Third, defendants ask that we affirm on the alternative ground that their conduct was not willful under the Fair Credit Reporting Act. Again, defendants' arguments fail in light of *Edo*. Finally, the district court did not reach the issue of a statute of limitations bar to plaintiff Massey's claim. We remand that issue for consideration to the district court in the first instance.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

[Mar. 3, 2004]

AMENDED OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendants' Motion for Summary Judgment (#144) and Motion to Strike Birnbaum Affidavit (#153). The Court heard oral argument on October 31, 2003.

For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment on the claims of Plaintiffs Shannon Massey and Charles Burr and **DENIES** Defendants' Motion for Summary Judgment on the claims of Plaintiff Lori Spano. In addition, the Court **GRANTS** Defendants' Motion to Strike the Affidavit of Birny Birnbaum (#153).

PLAINTIFFS' CLAIMS

Plaintiffs Lori Spano, Shannon Massey, and Charles Burr brought this class action for themselves and on behalf of similarly situated individuals who allege they purchased personal lines of insurance from Defendants SAFECO Insurance Company of Oregon (SAFECO Ore-

gon), SAFECO Insurance Company of Illinois (SAFECO Illinois), and American States Insurance Company. Plaintiffs allege Defendants used information in consumer credit reports when underwriting or rating such insurance policies, took adverse actions against Plaintiffs and others based on such information, and failed to provide notice of their adverse action as required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, *et seq.* Plaintiffs seek statutory damages, punitive damages, and attorneys' fees.

Defendants assert they took no adverse actions against the Plaintiffs within the meaning of FCRA. They also assert Plaintiffs fail to establish any willful violation of FCRA. Finally, Defendants maintain Plaintiff Massey's claim is barred by the applicable statute of limitations

FACTS

Unless otherwise noted, the following facts are taken from the parties' agreed on concise statements of fact.

Massey's Insurance Policy.

Massey purchased renters insurance from SAFECO Illinois on January 12, 2001. SAFECO Illinois has three tiers of renters insurance. The premium charged for the insurance depends on the tier in which the insured is placed. SAFECO Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Because of her credit score, SAFECO Illinois placed Massey in a tier with a higher premium rate.

Burr's Insurance Policies.

Burr purchased an automobile insurance policy from American States Insurance Company on July 6, 2001. American States underwrote the policy through a program designed for higher-risk drivers and relied on information in a consumer credit report. Because Burr was placed in a higher-risk drivers insurance program, a high credit score would not have improved the premium rate offered to Burr. On September 5, 2001, and again on

November 28, 2001, American States cancelled Burr's insurance policy for nonpayment of premiums. American States did not consider a consumer credit report when it cancelled either policy. American States reinstated the policy following both cancellations, but the policy ultimately lapsed for nonpayment of premiums on July 7, 2002.

Burr purchased automobile insurance from SAFECO Oregon on October 22, 2002. SAFECO Oregon relied on information in a consumer credit report to set the amount of Burr's premium. SAFECO Oregon thereafter increased Burr's premium twice because of alleged unreported moving violations or accidents.[1]

Spano's Insurance Policies.

Spano purchased an automobile insurance policy from SAFECO National Insurance Company on March 27, 1997. On September 23, 1997, the policy was endorsed to SAFECO Illinois. On May 11, 2001, the policy was endorsed to SAFECO Oregon. After it was first issued, the policy was cancelled four times because Spano failed to pay the premium. Each time the policy was reinstated. Consumer credit reports were not used to underwrite, to renew, or to cancel the policy. On August 14, 2001, the policy was cancelled for a fifth time because Spano again failed to pay a premium. On August 29, 2001, Spano requested SAFECO Oregon to reinstate the policy. SAFECO Oregon, however, declined to reinstate the policy based in part on information contained in a consumer credit report.

SAFECO Oregon's practice is either to reinstate insurance coverage on the same terms as the cancelled policy or not to reinstate the coverage on any terms. If Spano had applied to SAFECO Oregon for other automobile insurance after the fifth cancellation, SAFECO Oregon would have taken a new application or updated the old one

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[1] Burr does not contend SAFECO Oregon violated FCRA when it increased Burr's premium due to alleged unreported moving violations or accidents.

with a new credit score, driving record report, and claims history.

FAIR CREDIT REPORTING ACT

FCRA requires consumer credit reporting agencies to adopt procedures for meeting the needs of business in a manner both fair and equitable to the consumer. *See* 15 U.S.C. § 1681(b). The purpose of FCRA is to protect consumers from the transmission of inaccurate information about them. *Guimond v. TransUnion Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995).

Under FCRA, a consumer reporting agency may furnish consumer reports "to a person which it has reason to believe intends to use the information in connection with the underwriting of insurance involving the consumer." 15 U.S.C. § 1681b(3)(C). FCRA requires the user of information provided by consumer reporting agencies, such as an insurer issuing an insurance policy to an insured, to satisfy certain responsibilities. 15 U.S.C. § 1681m(a) provides:

> If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –
>
> (1) provide oral, written, or electronic notice of the adverse action to the consumer;
>
> (2) provide to the consumer orally, in writing, or electronically –
>
> > (A) the name, address, and telephone number of the consumer reporting agency . . . that furnished the report to the person; and
> >
> > (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

> (A) to obtain . . . a free copy of a consumer report on the consumer from the consumer reporting agency . . . which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and
>
> (B) to dispute . . . with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

In connection with insurance, FCRA defines an "adverse action" to include:

> (i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance . . . .

15 U.S.C. § 1681a(k)(1)(B)(i).

DEFENDANTS' MOTION TO STRIKE BIRNBAUM'S AFFIDAVIT

In support of their Opposition to Defendants' Motion for Summary Judgment, Plaintiffs filed the Affidavit of proposed expert witness Birny Birnbaum. In *Rausch v. The Hartford Financial Services Group, Inc.*, CV 01-1529 (D. Or. Jul. 31, 2003), this Court concluded the contents of Birnbaum's Affidavit together with a second expert declaration were not the proper subjects of expert testimony:

> To the extent the declarations contain legal arguments or suggest interpretations of the plain meaning of FCRA, the Court concludes the proposed expert affidavits do not contain material that is the proper subject of expert testimony.

Op. and Order at 5. There is no material difference in Birnbaum's testimony in this case. Accordingly, the Court finds Birnbaum's Affidavit is not the proper subject expert

testimony, and the Court, therefore, has not considered that testimony in determining Defendants' Motion for Summary Judgment.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Standards

Summary Judgment.

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e).

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Hensley v. Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 999 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 815 (2002). A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted)

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). If the

resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin*, 261 F.3d at 919.

Statutory Construction.

When a district court interprets a federal statute, it must apply a two-part analysis. "The first and most important step in construing a statute is the statutory language itself." *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001) (citing *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)). The court must look to the text of the statute to "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Accordingly, it is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989)). A court, therefore, must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Id.* (internal quotations and citations omitted).

If congressional intent is clear from the plain meaning of the statute, the court need not look further for guidance. *Id.* If a statute is unambiguous on its face, "there is ordinarily no reason to resort to legislative history to illuminate the language." *State of Cal. Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 853 (9th Cir. 2003). Courts look at legislative history when the plain language is unambiguous only if "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001), *cert. dismissed*, 535 U.S. 971 (2002)

(quoting *Perlman v. Catapult Entertainment, Inc.*, 165 F.3d 747, 753 (9th Cir.), *cert. dismissed*, 528 U.S. 924 (1999)). When the language of the statute is not dispositive, however, the courts look to the congressional intent revealed in the legislative history and "purposes of the statutory scheme." *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir.), *cert. denied*, 35 U.S. 1105 (2002).

In addition, if the statute is ambiguous as to the question at issue, the court must determine whether an agency interpretation of the statutory provision exists and is owed some degree of deference. *Brown & Williamson*, 529 U.S. at 132. When Congress expressly delegates authority or responsibility to an agency to implement a particular provision or to fill a particular gap in a statute, any ensuing regulation is binding on the courts unless it is procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). When it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," a reviewing court must accept the agency's interpretation as long as it is reasonable. *Id.* at 2172. The court, however, generally owes this degree of deference, commonly referred to as *Chevron* deference, only to formal agency interpretations such as those that follow notice-and-comment rulemakings or formal adjudications. *Id.* (*Chevron* deference is warranted only if the agency interpretation follows a "relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). *Id.* Nonetheless, the "well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance'" even if they do not have the force of law and are not entitled to *Chevron* deference. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)

(quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). Such an agency interpretation is entitled to "a respect proportional to its 'power to persuade.'" *Mead*, 533 U.S. at 218 (quoting *Skidmore*, 323 U.S. at 140)

Discussion

Claims of Massey and Burr.

When Massey initially applied for renters insurance, SAFECO Illinois charged her a premium rate higher than the optimal rate available for renters insurance based on her consumer credit report. When Burr applied for automobile insurance, American States and SAFECO Oregon charged him premium rates higher than the optimal rates available for automobile insurance based on his consumer credit report.

In *Mark v. Valley Insurance Co.*, CV 01-1575-BR (D. Or. July 17, 2003), this Court granted summary judgment to the defendant insurance company on a similar claim based on substantially the same facts as those alleged in this case. *See* Op. and Order at 24 (issued July 10, 2003). In *Mark*, the defendant insurer charged Gustafson, one of the plaintiffs, a premium rate for automobile insurance higher than the optimal rate based in part on Gustafson's credit history as reflected in a consumer credit report. The defendant did not send Gustafson a notice of adverse action under FCRA. This Court stated:

> [T]he common and ordinary meaning of § 1681a(k)(1)(B)(i) is that an insurer takes an adverse action when it "makes greater," i.e., "increases," the price previously demanded of the insured for insurance. The Court also finds § 1681a(k)(1)(B)(i) reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report. The Court, therefore, concludes the statute unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subse-

> quently increases that charge based on information in the insured's consumer credit report. Accordingly, the Court concludes Valley Insurance did not increase the charge for Gustafson's car insurance because it issued a single charge for that insurance coverage.

Op. and Order at 24. Massey and Burr's circumstances are factually and legally indistinguishable from those of Gustafson. Like Gustafson, both Massey and Burr were quoted a higher premium rate on their initial applications for insurance based on information in consumer credit reports. In Burr's case, it happened on two occasions arising from his applications for two separate policies.

Accordingly, the Court concludes the analysis and holding in *Mark* also apply here: i.e., SAFECO Illinois did not increase the charge for Massey's renters insurance policy and American States and SAFECO Oregon did not increase the respective charges for Burr's automobile insurance policies because neither Massey nor Burr had existing policies with either of these Defendants at the time they applied for insurance. Each insurer, therefore, was offering a single initial charge for the insurance coverage. Accordingly, the Court concludes Defendants American States and SAFECO Oregon are entitled to summary judgment on the claims brought against them by Plaintiffs Massey and Burr.[2]

Spano's Claim.

Spano requested SAFECO Oregon to reinstate his previously cancelled policy. SAFECO Oregon declined to do so based on information contained in a consumer credit report. Spano asserts the denial of reinstatement of his previous insurance policy was a denial of his request for insurance and, therefore, constituted an "adverse action" under FCRA.

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[2] Because of the Court's ruling that no adverse action was taken against Massey, whether her claim is barred by the statute of limitations is moot.

SAFECO Oregon asserts Spano did not apply for new insurance when he requested reinstatement of his previously cancelled policy. If it reinstates a policy, SAFECO Oregon established it only reinstates that policy on the same terms as the cancelled policy. SAFECO Oregon asserts, therefore, a "request for reinstatement" of a previously cancelled policy is not the same as an "application for insurance." In addition, SAFECO Oregon contends Spano did not fill out a written application when he requested reinstatement of the previously cancelled policy and, therefore, Spano did not "apply" for insurance.

The Court disagrees. Under FCRA, an "adverse action" includes the denial of "any insurance, existing or applied for in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). Regardless of the form of request, Spano was seeking automobile insurance from SAFECO Oregon that did not exist at the time of Spano's request. FCRA does not differentiate between insurance provided in a new policy and insurance provided in a previously cancelled policy. In addition, the plain meaning of the word "apply" includes "requests" as well as "written applications" even though the word is used more commonly in the context of a written application. *See Merriam-Webster's Collegiate Dictionary* 57 (11th ed. 1998) ("apply: to make an appeal or request, esp. in the form of a written application"). Thus, when SAFECO Oregon denied Spano's request, it denied him insurance under the plain meaning of the statute.

Accordingly, the Court concludes SAFECO Oregon's rejection of Spano's request for reinstatement of his previously cancelled automobile insurance policy based in part on information in a consumer credit report was an adverse action that required SAFECO Oregon to give notice to Spano pursuant to the requirements of FCRA. The Court, therefore, holds Defendants are not entitled to summary judgment on Plaintiff Spano's claims.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiffs Massey and Burr and **DISMISSES** these claims **with prejudice**. The Court **DENIES** Defendants' Motion for Summary Judgment (#144) on the claims of Plaintiff Spano. In addition, the Court **GRANTS** Defendants' Motion to Strike the Affidavit of Birny Birnbaum (#153).

IT IS SO ORDERED.

DATED this 3rd day of March, 2004.

/s/ ANNA J. BROWN
ANNA J. BROWN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 01-1464-BR

LORI SPANO, ET AL.,
Plaintiffs,

v.

SAFECO INSURANCE COMPANY OF AMERICA,
Defendant.

[Apr. 21, 2003]

OPINION AND ORDER

BROWN, District Judge.

This matter comes before the Court on Defendant's Motion for Summary Judgment (# 76), Defendant's Motion to Strike the Affidavit of Birny Birnbaum (# 103), and Plaintiffs'[1] Motion for Leave to File a Second (*sic*)[2] Amended Complaint (# 123).

For the following reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment and, therefore, **DISMISSES** Plaintiffs' claims against Defendant. The

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[1] As set out more fully below, Plaintiffs Joan Horton and Patricia McGrath and former Plaintiff Alan Opien voluntarily dismissed their claims in this action. In addition, all Plaintiffs dismissed their claims against Defendant SAFECO Corporation. The only claims that remain are the claims of Plaintiffs Lori Spano, Shannon Massey, and Charles Burr against Defendant SAFECO Insurance Company of America.

[2] Although Plaintiffs seek leave to file a "Second Amended Complaint," Plaintiffs already have filed three amended complaints. Accordingly, Plaintiffs actually seek leave to file a Fourth Amended Complaint.

Court also **DENIES as moot** Defendant's Motion to Strike the Affidavit of Birny Birnbaum.

In addition, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Leave to File a Second (*sic*) Amended Complaint.

MOTION FOR SUMMARY JUDGMENT

In their Third Amended Complaint, Plaintiffs allege Defendant SAFECO Insurance Company of America (SAFECO-America) violated the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, when it took or participated in the taking of adverse action with respect to the underwriting of Plaintiffs' personal lines insurance policies on the basis of information contained in Plaintiffs' consumer reports and then failed to notify Plaintiffs of that adverse action.

SAFECO-America moves for summary judgment on Plaintiffs' claims on three grounds. First, SAFECO-America argues it could not have taken any adverse action with respect to the underwriting of Plaintiffs' insurance policies because SAFECO-America is not a party to any of the underlying insurance policies. SAFECO-America contends, in any event, no adverse action was taken with respect to any Plaintiffs. Finally, SAFECO-America asserts Plaintiffs cannot establish that SAFECO-America willfully failed to comply with its obligations under FCRA because this matter involves legal issues of first impression.

Factual Background

In their pleadings, the parties offer the Court little undisputed material to consider. SAFECO-America fails to explain clearly the relationships between itself and its affiliated companies or the way those entities operate with respect to the underwriting and rating of individual policies. SAFECO-America instead merely states Plaintiffs' understanding of the relationships between those entities is inaccurate.

On the other hand, few of the statements of fact enumerated by Plaintiffs are supported by evidence in the record. Plaintiffs attempt to define the relationships between the SAFECO entities by relying on SAFECO-America's answers to various discovery requests. Plaintiffs, however, defined SAFECO-America for purposes of the discovery requests to include SAFECO-America and all of its subsidiaries and affiliates. Thus, the discovery responses on which Plaintiffs primarily rely do not support Plaintiffs' contention that SAFECO-America rather than its affiliates or subsidiaries performed any particular acts.

Nonetheless, the Court discerns the following undisputed facts from this convoluted record:

SAFECO Corporation (SAFECO) is the parent corporation of a group of insurance companies that are collectively referred to as the SAFECO Property and Casualty Insurance Companies. SAFECO-America is a wholly-owned subsidiary of SAFECO and one of the SAFECO Property and Casualty Insurance Companies. SAFECO Insurance Company of Illinois (SAFECO-Illinois) and American States Insurance Company (American) are also wholly-owned subsidiaries of SAFECO. SAFECO Insurance Company of Oregon (SAFECO-Oregon) is a wholly-owned subsidiary of SAFECO-America.

The SAFECO Property and Casualty Insurance Companies are independent companies with separate boards of directors. Each company holds separate board meetings and keeps separate books and minutes of those meetings. The SAFECO Property and Casualty Insurance Companies, however, jointly employ personnel. Each of the joint employees may work for multiple SAFECO Property and Casualty Insurance Companies. When an employee does work for a particular member company, he is considered an employee of that member company at that time.

SAFECO-America and several of the SAFECO Property and Casualty Insurance Companies are parties to an

Intercompany Reinsurance Agreement (Agreement).[3] Pursuant to the Agreement, SAFECO-America agrees to accept and to reinsure all of the liabilities and expenses related to the insurance policies that the signatory SAFECO Property and Casualty Insurance Companies issued in consideration for the companies' promises to transfer to SAFECO-America all of the premiums and reserve accounts associated with those policies. The listed SAFECO Property and Casualty Insurance Companies also agree to reinsure all of SAFECO-America's liabilities and expenses related to insurance policies issued by or on its behalf in exchange for SAFECO-America's agreement to transfer to each of the signatory companies that company's respective share of SAFECO-America's premiums and reserves, including that company's share of the amounts reinsured by SAFECO-America under the Agreement. In addition, the signatory SAFECO Property and Casualty Insurance Companies authorized SAFECO-America to collect and to receive all premiums; "to take charge of," to adjust, and to pay all losses with respect to all of their insurance policies; and to "reinsure, administer or terminate" all such policies as appropriate. The signatory SAFECO Property and Casualty Insurance Companies also agreed to assign to SAFECO-America all of their companies' rights and interests in their agents' balances and uncollected premiums as well as any other underwriting assets and related liabilities. In turn, SAFECO-America agreed to transfer and to assign to each company its respective allocation of such underwriting assets and liabilities.

The Agreement specifically provides that each of the signatory SAFECO Property and Casualty Insurance Companies:

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[3] SAFECO-Illinois and American are parties to the Agreement. SAFECO-Oregon is not a party to the Agreement.

1. "has the ultimate veto right on its underwriting";

2. "has the ultimate right to cancel its risks"; and

3. "has the ultimate responsibility for and control of claims adjustment and claims payment and investment management."

Friel Aff., Ex. 8 at Art. XII. In addition, SAFECO-America agrees to hold the premiums and to pay the expenses of the signatory SAFECO Property and Casualty Insurance Companies "in a fiduciary capacity" only. The Agreement also explicitly provides the parties entered into the Agreement solely for the benefit of the insurers who are parties to the Agreement. Finally, the Agreement provides it "shall not create any right or legal relation whatsoever between the primary insured and any party to this Agreement other than the company issuing the original insurance to such insured."

Although the exact nature and extent of SAFECO-America's role in the formulation of the SAFECO Property and Casualty Insurance Companies' policies regarding the underwriting of insurance policies, the retrieval of consumer reports, and the dissemination of FCRA notices is unclear from the record, it is undisputed that SAFECO-America did not enter into any insurance contracts directly with Plaintiffs nor issue any insurance policies to Plaintiffs. In fact, Plaintiffs' insurance policies were issued by other members of the SAFECO Property and Casualty Insurance Companies. In particular, SAFECO National Insurance Company originally issued Plaintiff Spano's automobile insurance policy. The policy subsequently was endorsed to SAFECO-Illinois and later to SAFECO-Oregon. SAFECO-Illinois issued Plaintiff Massey's renter's insurance policy. American issued Plaintiff Burr's automobile insurance policy.

Standards

Fed.R.Civ.P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law.

The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir.2002). In response to a properly-supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir.2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir.1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir.1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.2001).

Discussion

15 U.S.C. § 1681m(a) requires a person who "takes adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to provide notice of the adverse action to the consumer. In the insurance context, an adverse action means

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any in-

surance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i).

In *Razilov v. Nationwide Mut. Ins. Co.*,[4] this Court concluded FCRA only requires the person who actually takes the adverse action to notify the consumer. 242 F.Supp.2d at 991-92 (D.Or.2003). In addition, the Court held a person does not actually take adverse action if the person merely participates in the formulation of policies, guidelines, or standards that may lead to the taking of adverse action. *Id.* In *Ashby v. Farmers Group, Inc.*, this Court further held only an entity capable of changing the terms of an insurance contract with an insured can take adverse action under the plain meaning of § 1681m(a). 261 F.Supp.2d 1213, 2003 WL 21078356 (D.Or.2003). In other words, only a person who contracts with the insured and, therefore, accepts the risk and obligation to pay claims and acquires the corresponding right to set and to receive premiums from the insured can take an adverse action with respect to the insured. *Id.*

As noted, it is undisputed that SAFECO-America did not enter into any insurance contracts with Plaintiffs and did not issue any insurance policies to Plaintiffs. Plaintiffs, nonetheless, seem to argue the facts of this case are distinguishable from the facts of *Razilov* and *Ashby* because the SAFECO entities entered into a reinsurance agreement.

"Reinsurance is essentially the mechanism by which insurers protect themselves from financial disaster that could ensue if the risks that they have underwritten result in losses at a rate far in excess of that which was assumed when the risks were accepted." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 9:1 (3d ed.2003). In other words, reinsurance allows an insurance company

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[4] Plaintiffs' counsel represent multiple Plaintiffs in eleven related putative class actions that involve alleged FCRA violations and that are currently pending in this Court.

to spread its risk to another company or to multiple companies. Such agreements, however, are between the primary insurer and its reinsurer(s) and create obligations and rights between those parties only. Reinsurance agreements do not alter the contractual relationship between the original insured and the insurer. *See id.* § 9:28 ("[I]t is widely recognized that the nature of reinsurance relationships does not render the reinsurer directly liable to the original insured.").

Although the Agreement at issue here contemplates SAFECO-America will collect the premiums, adjust the losses, and provide some degree of direction regarding the underwriting and rating of the signatory SAFECO Property and Casualty Companies' premiums, the Agreement unambiguously provides the ultimate control over and responsibility for underwriting and claims decisions lies with the individual insurers. The Agreement, therefore, did not change the relationships between Plaintiffs and their primary insurers. Notwithstanding the broad language in the Agreement to the contrary, only the entities that contracted with Plaintiffs and issued their policies could deny, cancel, increase the charge for, or reduce or change the terms of Plaintiffs' insurance. The Court, therefore, concludes Plaintiffs failed to show facts sufficient for a reasonable juror to conclude SAFECO-America took an adverse action against Plaintiffs. Accordingly, the Court concludes SAFECO-America is entitled to summary judgment as a matter of law and dismisses Plaintiffs' claims against SAFECO-America.[5]

MOTION TO STRIKE THE AFFIDAVIT OF BIRNY BIRNBAUM

SAFECO-America also moves to strike the Affidavit of Birny Birnbaum, which Plaintiffs filed in support of their

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[5] Because the Court concludes SAFECO-America is entitled to summary judgment on this ground, the Court will not address whether SAFECO-America would be entitled to summary judgment on the alternative grounds raised in SAFECO-America's Motion.

Memorandum in Opposition to SAFECO-America's Motion for Summary Judgment. In his Affidavit, Birnbaum primarily addresses issues other than whether SAFECO-America was an entity that took adverse action against Plaintiffs. Because the Court granted SAFECO-America's Motion for Summary Judgment on the ground that SAFECO-America did not take adverse actions against Plaintiffs, Birnbaum's testimony is now irrelevant for purposes of SAFECO-America's Motion. The Court, therefore, denies SAFECO-America's Motion to Strike as moot.

MOTION FOR LEAVE TO FILE SECOND (sic) AMENDED COMPLAINT

Procedural Background

On October 2, 2001, Plaintiff Lori Spano brought on her behalf and on behalf of all others similarly situated this purported class action against SAFECO for alleged violations of FCRA. In particular, Plaintiff Spano alleged SAFECO took adverse actions against her with respect to the underwriting of her automobile insurance as a result of information contained in her consumer report without notifying her as required under FCRA. On November 13, 2001, SAFECO filed its Answer, Defenses, and Affirmative Defenses to Plaintiff Spano's Complaint. SAFECO admitted its subsidiaries had used information contained in consumer reports when underwriting policies for automobile insurance. SAFECO, however, affirmatively pled it was not the "real party in interest" and Plaintiff Spano named the wrong party because

> SAFECO Corporation does not conduct or engage in any underwriting and does not issue insurance policies. SAFECO Corporation did not have any dealings with plaintiff, did not take any "adverse actions" toward plaintiff, and never issued an insurance policy to plaintiff.

Def.'s Ans., Def., and Affirmative Def. at 5.

On December 21, 2001, Plaintiff Spano filed a Motion for Leave to File a First Amended Complaint to add Alan Opien as a named plaintiff. In an Order dated January 8, 2002, the Court granted the Motion over SAFECO's objection. Plaintiffs Spano and Opien filed their First Amended Complaint the following day. SAFECO filed its Answer, Defenses, and Affirmative Defenses to the First Amended Complaint on January 24, 2002. Again, SAFECO asserted it was not the proper defendant because it did not issue any insurance policies to Plaintiffs Spano or Opien.

On June 4, 2002, Plaintiffs Spano and Opien filed a Motion for Leave to File a Second Amended Complaint. Plaintiffs Spano and Opien sought to do the following: 1) add two additional named plaintiffs, Shannon Massey and Joan Horton; 2) extend the class period back to January 2000 from September 2000; 3) add SAFECO-America as a defendant; and 4) add allegations to clarify that their claims relate to all personal lines of insurance rather than merely automobile insurance. On June 7, 2002, the Court dismissed Plaintiff Opien from this action pursuant to the stipulation of the parties. On July 9, 2002, the Court granted Plaintiff Spano leave to file the proposed Second Amended Complaint over SAFECO's objection. The Second Amended Complaint, however, named only SAFECO-America and did not name SAFECO as a party.

During a July 22, 2002, status conference with counsel, the Court granted the oral motion of Plaintiffs Spano, Massey, Horton, and Burr to add Patricia McGrath as an additional plaintiff and putative class representative. Plaintiffs filed their Third Amended Complaint against SAFECO-America on July 23, 2002. For the first time, Plaintiffs alleged SAFECO-America violated FCRA when it took "or participated in taking" adverse actions with respect to the underwriting of Plaintiffs' insurance policies.

On August 8, 2002, pursuant to a stipulation of the parties, the Court dismissed SAFECO from this action and

ordered the parties to use the caption as set forth on the first page of this Opinion and Order in all subsequent pleadings.

On that same day, SAFECO-America filed its Answer, Defenses, and Affirmative Defenses to the Third Amended Complaint. SAFECO-America admitted Plaintiffs entered into insurance contracts with its subsidiaries or affiliates. Although SAFECO-America generally denied taking or participating in the taking of adverse action with respect to the underwriting of Plaintiffs' insurance policies, SAFECO-America did not assert as an affirmative defense that it was not the real party in interest or that Plaintiffs had sued the wrong party.

On September 23, 2002, the parties filed a stipulated dismissal of Plaintiffs Horton and McGrath. On November 22, 2002, SAFECO-America filed a Motion for Summary Judgment with respect to the remaining claims of Plaintiffs Spano, Massey, and Burr on the ground that SAFECO-America, among other things, did not and could not have taken adverse action with respect to the underwriting of Plaintiffs' insurance policies because those underlying policies were solely between Plaintiffs and SAFECO-America's affiliates.

As noted, on January 21, 2003, the Court granted Nationwide Mutual Insurance Company's Motion for Summary Judgment in a related FCRA case, *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977 (D.Or.2003). The Court held Nationwide did not take an adverse action for purposes of FCRA liability even though it established a decision-making process; provided consumer report information; and set the policies, guidelines, and standards that led to the taking of an adverse action. *Id.*, at 991-92. On February 20, 2003, this Court granted Farmers Group, Inc.'s Motion for Summary Judgment in another related FCRA matter, *Ashby v. Farmers Group, Inc.*, 261 F.Supp. 2d 1213, 2003 WL 21078356 (D.Or.2003). The Court extended its holding in *Razilov* and concluded only a person who contracts with an insured and, therefore, accepts

the risk and obligation to pay claims and acquires the corresponding right to set and to receive premiums from the insured can take an adverse action with respect to the insured. *Id.*

On March 3, 2003, Plaintiffs filed their current motion to amend. Plaintiffs move the Court for leave to amend their Third Amended Complaint to add claims against SAFECO-Illinois, SAFECO-Oregon, and American. In their Motion, Plaintiffs state they seek leave to amend in order to have these new claims relate back to October 2, 2001, the date that Plaintiff Spano filed the original Complaint in this matter.

On March 20, 2003, Plaintiffs filed a second putative class action against SAFECO-Illinois, SAFECO-Oregon, and American, CV 03-363-BR, for alleged violations of FCRA. Plaintiffs did not name SAFECO-America as a defendant in the new action.

Allegations in Plaintiffs' Proposed Second (sic) Amended Complaint

Plaintiffs Spano, Massey, and Burr attempt to bring this action on behalf of themselves and all other persons who purchased personal lines of insurance from SAFECO-Illinois, SAFECO-Oregon, and American "and their affiliates" from January 2000 to present. Plaintiffs allege SAFECO-Illinois, SAFECO-Oregon, and American took adverse action with respect to the underwriting of the insurance policies issued to Plaintiffs and all others similarly situated based on information contained in consumer reports. Plaintiffs further allege SAFECO-Illinois, SAFECO-Oregon, and American willfully failed to provide Plaintiffs and all others similarly situated with oral, written, or electronic notice of such adverse actions as required by 15 U.S.C. § 1681m(a). Plaintiffs seek an award of statutory damages, punitive damages, attorneys' fees, and costs on behalf of themselves and all other members of the class.

Standards

Fed.R.Civ.P. 15(a) provides a party may amend a pleading only by leave of court after a responsive pleading has been filed unless the opposing party consents to the amendment. Rule 15(a), however, also provides that leave to amend "shall be freely given when justice so requires." "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003). The Supreme Court has recognized several factors that a district court should consider when determining whether justice requires the court to grant leave to amend. Those factors include:

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment.

Id. at 1052 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The factor that carries the greatest weight is whether amendment will cause the opposing party prejudice. *Id.* "Absent prejudice or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Id.*

Discussion

SAFECO-America contends each of the *Foman* factors weighs against granting Plaintiffs leave to amend their Third Amended Complaint.

A. Undue Prejudice

As noted, whether an amendment will cause undue prejudice to the defendant is the key factor the court must consider when determining whether to grant a motion for leave to file an amended complaint. *Eminence Capital*, 316 F.3d at 1052. The party who opposes amendment bears the burden to show prejudice. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir.1987).

SAFECO-America contends it will suffer undue prejudice if the Court allows Plaintiffs to file a Fourth Amended Complaint because such an amendment would allow Plaintiffs to avoid an adverse summary judgment ruling. SAFECO-America also argues it will suffer undue prejudice if the Court grants Plaintiffs' Motion because it could be required to pay attorneys' fees incurred by Plaintiffs pursuant to the fee-shifting provision of FCRA if Plaintiffs eventually prevail on their claims.

15 U.S.C. § 1681n provides in part:

> Any person who willfully fails to comply with FCRA's requirements is liable to a consumer in an amount equal to the sum of . . . in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

The Court, however, has granted summary judgment to SAFECO-America as to all of Plaintiffs' claims against it. SAFECO-America, therefore, will not be required to pay the attorneys' fees incurred by Plaintiffs regardless of the viability of Plaintiffs' proposed claims against SAFECO-Illinois, SAFECO-Oregon, or American. Thus, the Court finds SAFECO-America has not suffered any prejudice, and its arguments regarding summary judgment and attorneys' fees are moot.

The Court, however, must consider whether granting Plaintiffs' motion to amend would cause undue prejudice to SAFECO-Illinois, SAFECO-Oregon, and American. *See DCD Programs*, 833 F.2d at 187 (the district court's "major objective" is to avoid prejudice to the party to be added in the proposed amended complaint). Pursuant to § 1681n, SAFECO-Illinois, SAFECO-Oregon, and American may be required to pay Plaintiffs' reasonable attorneys' fees if Plaintiffs eventually prevail on their FCRA claims. In that event, however, the parties may argue whether the attorneys' fees incurred by Plaintiffs in pursuit of their claims against SAFECO and SAFECO-America are "reasonable" attorneys' fees to be attributed

to SAFECO-Illinois, SAFECO-Oregon, and American pursuant to FCRA's fee-shifting provision. At that time, the Court can address whether Plaintiffs' alleged intentional, strategic decision prejudiced the proposed defendants.

SAFECO-America does not argue it or the proposed defendants will suffer any additional prejudice. SAFECO-America appears to concede that SAFECO-Illinois, SAFECO-Oregon, and American had adequate notice of this action. Plaintiffs' allegations against the proposed defendants are nearly identical to the allegations against SAFECO-America set out in Plaintiffs' Third Amended Complaint.[6] Moreover, SAFECO-America does not dispute Plaintiffs' contention that, no additional discovery will be required if the Court grants Plaintiffs' motion to amend. The Court previously determined it would set additional case management dates in this matter after it resolved SAFECO-America's Motion for Summary Judgment. If the proposed defendants wish to raise any additional issues of potential prejudice caused by Plaintiffs' delay in filing their motion to amend, the Court can address those issues when the Courts sets the case management schedule.

Based on this record, the Court finds neither SAFECO-America nor the proposed defendants, SAFECO-Illinois, SAFECO-Oregon, or American, will suffer undue prejudice if the Court grants Plaintiffs leave to file a Fourth Amended Complaint.

B. Bad Faith or Dilatory Motive

SAFECO-America argues Plaintiffs have exhibited bad faith by making an "eleventh-hour" request to add the proposed defendants after the failure of Plaintiffs' strategic decision to bring this action solely against SAFECO-America and not against the individual insurers who contracted with Plaintiffs and whose names appear on Plaintiffs' insurance policies. SAFECO-America speculates

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[6] Plaintiffs no longer allege participatory liability.

Plaintiffs initially chose to pursue only SAFECO-America in hopes of increasing the likelihood that the Court would certify a large national class and to avoid the need to locate additional class representatives.

Assuming for purposes of this Motion that Plaintiffs indeed made such a conscious strategic decision, the Court finds this fact does not support a finding that Plaintiffs filed the current motion in bad faith or for a dilatory purpose. Plaintiffs' allegations against SAFECO-Illinois, SAFECO-Oregon, and American are not frivolous on their face or in the context of the Court's decisions in the related FCRA actions, *Razilov* and *Ashby*. The parties apparently agree the addition of the proposed defendants will not cause any delay in the proceedings or require either SAFECO-America or the proposed defendants to incur expenses they otherwise would not be required to pay. The Court, therefore, concludes SAFECO-America has failed to show Plaintiffs' Motion was filed in bad faith or for a dilatory purpose.

C. Previous Amendments

The district court's discretion to deny leave to amend is "particularly broad" if the plaintiff previously has amended the complaint. *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.1989). Thus, a court may deny leave to amend if the plaintiff has filed multiple pleadings and failed to cure pre-existing deficiencies. *Eminence Capital*, 316 F.3d at 1053. The Ninth Circuit, however, has implied the number of complaints previously filed carries less weight when the plaintiff adds a new theory or a new defendant to an action. *Id.* Under those circumstances, the court notes the plaintiff has not had multiple opportunities to cure known, pre-existing deficiencies in earlier versions of the complaint. *Id.*

Plaintiffs have amended the original Complaint three times. In each instance, Plaintiffs added additional class representatives. In addition, Plaintiffs substituted SAFECO-America for SAFECO after they discovered SAFECO-America's relationship with Plaintiffs' insurers.

Plaintiffs' Proposed Second (*sic*) Amended Complaint is the first pleading to include allegations against SAFECO-Illinois, SAFECO-Oregon, and American. As a result, Plaintiffs previously have not had the opportunity to cure deficiencies in the proposed amended complaint. The Court, therefore, concludes the fact that Plaintiffs previously amended the original Complaint on multiple occasions does not weigh in favor of denying Plaintiffs leave to file a Fourth Amended Complaint to add claims against the proposed defendants.

D. Futility

A proposed amendment to a complaint "'is futile only if no set of facts can be proved under the amendment . . . that would constitute a valid and sufficient claim.'" *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.1988)). A plaintiff should be afforded an opportunity to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the proposed amended complaint would be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Miller*, 845 F.2d at 214. *See also DCD Programs*, 833 F.2d at 188.

The Court has granted SAFECO-America's Motion for Summary Judgment on the ground that no reasonable juror could conclude from this record that SAFECO-America took adverse actions against Plaintiffs. Accordingly, Plaintiffs' Proposed Second (*sic*) Amended Complaint could not withstand a motion to dismiss with respect to Plaintiffs' claims against SAFECO-America. The Court, therefore, concludes it would be futile for the Court to grant Plaintiffs' Motion to amend with respect to Plaintiffs' allegations against SAFECO-America.

SAFECO-America also argues it would be futile to grant Plaintiffs' Motion with respect to their new claims against SAFECO-Illinois, SAFECO-Oregon, and American because the alternative grounds in SAFECO-America's Motion for Summary Judgment would also preclude claims

against the proposed defendants. SAFECO-America, therefore, "believes this Court should address these . . . [alternative grounds] before it permits any further amendments." The Court declines SAFECO-America's request to issue an advisory opinion on SAFECO-America's alternative grounds for summary judgment for the purpose of determining whether the proposed defendants later might succeed on the merits. Plaintiffs have alleged in their Proposed Second (*sic*) Amended Complaint that SAFECO-Illinois, SAFECO-Oregon, and American took adverse actions with respect to Plaintiffs based on information contained in their consumer reports and then willfully failed to notify Plaintiffs of those adverse actions. Plaintiffs' allegations are legally sufficient. Assuming the truth of those allegations for purposes of Plaintiffs' motion to amend, it is not beyond doubt that Plaintiffs can prove a set of facts in support of these claims. The Court, therefore, concludes SAFECO-America has not shown it would be futile for the Court to grant the Motion to amend with respect to the claims against SAFECO-Illinois, SAFECO-Oregon, and American.

In their motion to amend, Plaintiffs state they "seek to amend the complaint so the amended pleading will relate back to the original pleading for purposes of statute of limitations." Plaintiffs argue "relation back" is appropriate pursuant to Fed.R.Civ.P. 15(c) because the claims in the Proposed Second (*sic*) Amended Complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original Complaint; the proposed defendants received notice of the institution of the action within the prescribed time; and the proposed defendants knew or should have known that, but for a mistake concerning the identity of the proper party, Plaintiffs would have brought the action against the proposed defendants. In SAFECO-America's Response, it contends Plaintiffs' new claims against SAFECO-Illinois, SAFECO-Oregon, and American should not relate back to the origi-

nal Complaint because Plaintiffs did not make a mistake of identity.

SAFECO-America, however, did not argue it would be futile for the Court to grant Plaintiffs' motion to amend because all or some of Plaintiffs' claims against the proposed defendants are barred by the applicable statute of limitations. Moreover, Plaintiffs have not filed a formal motion to have the Proposed Second (*sic*) Amended Complaint relate back to the original Complaint. In short, neither party has addressed 1) the applicable statute of limitations; 2) the extent to which some or all of Plaintiffs' claims might be barred by the applicable statute of limitations; 3) the dates of the alleged adverse actions; 4) whether Plaintiffs' previous amendments should relate back to the original Complaint; or 5) the proper standard for relating back in a purported class action. Because the issue is not squarely before the Court at this time and the parties have failed to brief the issue adequately, the Court cannot determine on this record whether Plaintiffs' claims against the proposed defendants relate back to the date of the original Complaint or whether it would be futile for the Court to grant Plaintiffs' Motion because all or part of Plaintiffs' proposed claims are barred by the statute of limitations.

E. Undue Delay

Plaintiff Spano initiated this action in October 2001. Plaintiffs knew early in the litigation that SAFECO-Illinois, SAFECO-Oregon, and American were the parties with whom Plaintiffs contracted for insurance. Plaintiffs, however, did not move to add those insurers as defendants until March 2003. Although seventeen months passed before Plaintiffs decided to pursue these claims, the Court has not set any deadlines in this matter. Discovery is not yet complete, and a trial date is not looming. The Court already has found neither SAFECO-America nor the proposed defendants will suffer undue prejudice as a result of the addition of these defendants at this stage in the litigation. Under these circumstances, the

Court finds Plaintiffs did not unduly delay asking the Court for permission to add the proposed defendants.

F. Weighing the Factors

The Ninth Circuit has held "delay, by itself, is insufficient to justify denial of leave to amend." *DCD Programs*, 833 F.2d at 186. The most important issue for the Court to determine is whether the existing defendant or the proposed defendants will suffer undue prejudice if the Court grants the motion to amend. The Court finds SAFECO-America has failed to show that it or its affiliates will suffer undue prejudice if the Court grants Plaintiffs leave to amend the Third Amended Complaint to add claims against SAFECO-Illinois, SAFECO-Oregon, and American. SAFECO-America also has failed to show it would be futile for the Court to grant Plaintiffs' motion to amend with respect to their claims against SAFECO-Illinois, SAFECO-Oregon, and American. Plaintiffs' proposed claims are not frivolous, and SAFECO-America has not shown Plaintiffs filed such claims in bad faith or for the purpose of delaying these proceedings.

Based on the foregoing, the Court grants Plaintiffs leave to amend their Third Amended Complaint to include claims against SAFECO-Illinois, SAFECO-Oregon, and American. The Court, however, concludes it would be futile for the Court to grant Plaintiffs' Motion with respect to Plaintiffs' claims against SAFECO-America as noted herein and, therefore, denies Plaintiffs' Motion to that extent.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment (# 76) and, therefore, **DISMISSES** Plaintiffs' claims against Defendant. The Court also **DENIES as moot** Defendant's Motion to Strike the Affidavit of Birny Birnbaum (# 103).

In addition, the Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion for Leave to File a Second (*sic*) Amended Complaint (# 123). Plaintiffs shall caption the

new pleading "Fourth Amended Complaint"; delete all previous or proposed allegaticns regarding Plaintiffs' claims against SAFECO-America; add the proposed allegations regarding Plaintiffs' claims against SAFECO-Illinois, SAFECO-Oregon, and American; and otherwise ensure the Fourth Amended Complaint is consistent with this Opinion and Order. Plaintiffs shall file their Fourth Amended Complaint no later than April 29, 2003.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35313

[D.C. No. CV-01-01464-AJB
District of Oregon, Portland]

LORI SPANO, ET AL.,
Plaintiffs,

AND

CHARLES BURR, ET AL.,
Plaintiffs-Appellants,

v.

SAFECO CORPORATION, ET AL.,
Defendants-Appellees.

[Filed Apr. 20, 2006]

ORDER

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny Appellees' petition for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and rehearing en banc is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Aug. 4, 2005]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i).

1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that ac-

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[2] We do not intend this list to be exhaustive.

tion, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, de-

fendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) (defining "increase"

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased

the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added).

Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific

requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynold's credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfect consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a reasonable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides unreasonable answers to issues of first impression is sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement.

Here, Hartford Fire, GEICO General, GEICO Indemnity, and Government Employees' interpretation of the statute was not reasonable. Indeed, the companies' exceedingly narrow interpretations of their obligations under FCRA were counter to the statute's plain text as well as its purpose. Relying on reasoning that was objectively unmeritorious, these companies sought to benefit from the privilege of using consumers' private credit information and yet be free of the attendant obligations. Specifically, Hartford Fire's contention that FCRA's adverse action notice requirement does not apply when a company charges a higher price for an initial insurance policy, but only when it has previously charged the consumer a lower rate, finds no basis in the statute. Likewise, its argument that adverse action notices are not required when a credit transmission reports that a consumer does not have adequate credit information to generate a score is clearly contrary to FCRA's language and to the purpose of the statute. Furthermore, Hartford Fire's argument that an adverse action notice sufficiently complies with FCRA's requirement even if it does not disclose that an adverse action was taken or the nature of that action is nonsensical. The GEICO Companies' argument that they are free to send adverse action notices only to those consumers whose credit rating is below average and not to those with a higher rating also finds absolutely no support in the

statute. Likewise, GEICO General does not make even a colorable argument that it did not take adverse action against Edo when, acting in conjunction with the other affiliated companies, it failed to provide him with a policy at a preferred rate; denials are clearly covered by the adverse action definition. Finally, Hartford Fire and Government Employees' argument that they are not liable because, even though they may have made the decision to increase the consumers' rates, they did not issue the policies is unreasonable as the statute on its face is not limited to issuers. We therefore hold that on the record before us the defendants all acted in reckless disregard of the consumers' statutory rights.[18] Accordingly, defen-

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[18] The dissent argues that we should not decide the question whether the companies wilfully failed to comply with FCRA's requirements because the district court did not reach the issue. We disagree. The district court did rule directly on all of the principal issues on which we hold the companies' positions to be unreasonable and necessarily found them reasonable. For example, as to Hartford Fire's contention that FCRA's adverse action notice requirement does not apply to an initial charge, the district court concluded that Hartford Fire was correct and that the initial setting of an insurance premium at a rate higher than the best rate available does not constitute an "adverse action" under FCRA. *Rausch v. Hartford Financial Services Group, Inc.*, 2003 WL 22722061, at *2 (D.Or.2003). As to the GEICO Companies' argument that they are free to send adverse action notices only to consumers whose credit rating is below average, as we have explained in the text at footnote 12, this claim is functionally identical to GEICO's argument that the action was not adverse because the charge was the same as if no credit information had been used. *See* n.12, *supra*. With respect to this issue, the district court ruled that GEICO was correct when it concluded that, because the premium charged to Edo would have been the same regardless of the information contained in Edo's credit history, there was no genuine issue of material fact as to whether GEICO Indemnity took an adverse action against Edo. *Edo v. Geico Casualty Co.*, No. 02-678, slip op. at 11 (D.Or. February 23, 2004). As to GEICO's argument that denials of coverage are not covered by the adverse action definition, the district court again held that GEICO was correct and that Edo had "failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action." *Id.* at 12.

Finally, as to both Hartford Fire and Government Employee's argument that they are not liable because they did not issue the policies,

dants' argument for summary judgment on the basis that they did not act willfully also fails.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

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the district court once again agreed, holding that only the entity that issues the insurance policy can be held to have taken an adverse action under FCRA. *Rausch*, 2003 WL 22722061 at *1; *Edo*, slip op. at 10-11.

Because the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' positions were not unreasonable. Under these circumstances and because the question of the reasonableness of a legal contention is essentially a question of law, it is not necessary, and indeed would be futile, to remand to the district court the question whether the companies willfully failed to comply with FCRA.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Finally, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, that Hartford Fire's adverse action notices were sufficient, or that the defendants' actions were not willful. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynold's request to amend his complaint to add Hartford PCIC and Hartford Mid-west, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BYBEE, Circuit Judge, dissenting in part.

I join the majority opinion except so much of Section II.F that concludes that GEICO and Hartford insurance companies willfully violated FCRA. The district court awarded judgment to the insurance companies on summary judgment without reaching the question whether the companies "willfully fail[ed] to comply" with the requirements of FCRA. 15 U.S.C. § 1681n(a). The insurance companies urged the district court, as an alternative ground, to hold that the companies did not act willfully as a matter of law. They urged the same position to us on appeal as an alternative ground for affirming the judgment. The appellants did not brief the question of will-

fulness until the reply briefs, and in each case the appellants requested that we decline to rule for the insurance companies and remand the case to the district court for further proceedings.

I would not decide, as a matter of law or fact, that the insurance companies behaved willfully on the basis of their lawyers' arguments on appeal. I cannot conclude on the basis of the record before us that the companies' actions here were so "objectively unmeritorious," "clearly contrary to FCRA's language," "nonsensical," and without "colorable argument" that we can decide their willfulness ourselves without the benefit of findings of fact. Maj. Op. at 1115-1116 [App., *supra*, 64a-66a].

Accordingly, I would remand the question of whether the companies willfully failed to comply with FCRA to the district court for further proceedings. I respectfully dissent as to that portion of the opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Oct. 3, 2005]

[Amended Oct. 24, 2005]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge.

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in

consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer,

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action

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[2] We do not intend this list to be exhaustive.

has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, 2005 WL 2714503 and *Edo v. GEICO Casualty Co.*, 2004 WL 2731226. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the

process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

new policy-holder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the fact-finder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will here after refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n. 5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memorandum dispositions filed separately.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance-score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement,

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the

"[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate

was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient credit information on file conveys a message regarding the consumer's

creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse ac-

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the

tion" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfect consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing non-compliance even though the answer to a previously undecided question is objectively apparent and imposing liability not withstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers to issues of first impression is sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement.[18] We hold that reliance on such implausible interpretations constitutes reckless disregard for the law and therefore amounts to a willful violation of the law.

Here, Hartford Fire, GEICO General, GEICO Indemnity, and Government Employees' interpretation of the statute was untenable. Indeed, the companies' exceedingly narrow interpretations of their obligations under FCRA were counter to the statute's plain text as well as its purpose. Relying on reasoning that was plainly unmeritorious, these companies sought to benefit from the privilege of using consumers' private credit information and yet be free of the attendant obligations. Specifically, Hartford Fire's contention that FCRA's adverse action notice requirement does not apply when a company charges a higher price for an initial insurance policy, but only when it has previously charged the consumer a lower rate, finds no basis in the statute. Likewise, its argument that adverse action notices are not required when a credit

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[18] Consulting with attorneys is evidence of lack of willfulness, but is not dispositive. *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir.1993); *accord Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir.1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Thus, consultation with attorneys who then produce an implausible legal opinion that purports to relieve the insurance companies of their clear statutory responsibilities does not serve automatically to avoid a charge of reckless disregard.

transmission reports that a consumer does not have adequate credit information to generate a score is clearly contrary to FCRA's language and to the purpose of the statute. Furthermore, Hartford Fire's argument that an adverse action notice sufficiently complies with FCRA's requirement even if it does not disclose that an adverse action was taken or the nature of that action is nonsensical. The GEICO Companies' argument that they are free to send adverse action notices only to those consumers whose credit rating is below average and not to those with a higher rating also finds absolutely no support in the statute. Likewise, GEICO General does not make even a colorable argument that it did not take adverse action against Edo when, acting in conjunction with the other affiliated companies, it failed to provide him with a policy at a preferred rate; denials are clearly covered by the adverse action definition. Finally, Hartford Fire and Government Employees' argument that they are not liable because, even though they may have made the decision to increase the consumers' rates, they did not issue the policies is not colorable as the statute on its face is not limited to issuers. We therefore hold that on the record before us the defendants all acted in reckless disregard of the consumers' statutory rights.[19] Accordingly, defendants' ar-

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[19] The dissent argues that we should not decide the question whether the companies wilfully failed to comply with FCRA's requirements because the district court did not reach the issue. We disagree. The district court did rule directly on all of the principal issues on which we hold the companies' positions to be untenable and necessarily found their actions not to be willful as a result of their reliance on an untenable interpretation of the statute. For example, as to Hartford Fire's contention that FCRA's adverse action notice requirement does not apply to an initial charge, the district court concluded that Hartford Fire was correct and that the initial setting of an insurance premium at a rate higher than the best rate available does not constitute an "adverse action" under FCRA. *Rausch v. Hartford Financial Services Group, Inc.*, 2003 WL 22722061, at *2 (D.Or.2003). As to the GEICO Companies' argument that they are free to send adverse action notices only to consumers whose credit rating is below average, as we have explained in the text at footnote 12, this claim is functionally identical to GEICO's argument that the action was not adverse be-

gument for summary judgment on the basis that they did not act willfully also fails.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify

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cause the charge was the same as if no credit information had been used. *See* n.12, *supra*. With respect to this issue, the district court ruled that GEICO was correct when it concluded that, because the premium charged to Edo would have been the same regardless of the information contained in Edo's credit history, there was no genuine issue of material fact as to whether GEICO Indemnity took an adverse action against Edo. *Edo v. Geico Casualty Co.*, No. 02-678, slip op. at 11 (D.Or. February 23, 2004). As to GEICO's argument that denials of coverage are not covered by the adverse action definition, the district court again held that GEICO was correct and that Edo had "failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action." *Id.* at 12. Finally, as to both Hartford Fire and Government Employee's argument that they are not liable because they did not issue the policies, the district court once again agreed, holding that only the entity that issues the insurance policy can be held to have taken an adverse action under FCRA. *Rausch*, 2003 WL at *1; *Edo*, slip op. at 10-11.

Because the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, a fortiori, that the companies' reliance on these positions did not amount to reckless disregard for the law. Under these circumstances and because the question of willfulness as applied to a legal contention is essentially a question of law, it is not necessary, and indeed would be futile, to remand to the district court the question whether the companies willfully failed to comply with FCRA.

the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Finally, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, that Hartford Fire's adverse action notices were sufficient, or that the defendants' actions were not willful. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

BYBEE, Circuit Judge, dissenting in part:

I join the majority opinion except so much of Section II.F that concludes that GEICO and Hartford insurance

companies willfully violated FCRA. The district court awarded judgment to the insurance companies on summary judgment without reaching the question whether the companies "willfully fail[ed] to comply" with the requirements of FCRA. 15 U.S.C. § 1681n(a). The insurance companies urged the district court, as an alternative ground, to hold that the companies did not act willfully as a matter of law. They urged the same position to us on appeal as an alternative ground for affirming the judgment. The appellants did not brief the question of willfulness until the reply briefs, and in each case the appellants requested that we decline to rule for the insurance companies and remand the case to the district court for further proceedings.

I would not decide as a matter of fact that the insurance companies behaved willfully on the basis of their lawyers' arguments on appeal. I cannot conclude on the basis of the record before us that the companies' actions here were so "indefensible," "implausible," "untenable," "plainly unmeritorious," "clearly contrary to FCRA's language," "nonsensical," and without "colorable argument" that we can conclude that the companies' "reliance on such implausible interpretations constitutes reckless disregard for the law" and decide their willfulness ourselves without the benefit of findings of fact or full briefing.

If I thought our record was complete, I would not find that the companies willfully failed to comply with FCRA as a matter of law. The majority holds that we can reach the question because the district "necessarily found their actions not to be willful as a result of their reliance on an untenable interpretation of the statute." The reason the district court "*necessarily* found their actions not to be willful" is because the district court *agreed* with their legal position, a position the majority now declares to be "nonsensical" and "untenable." While I agree with the majority that the district court's understanding of FCRA was wrong, I cannot go so far as to conclude that the district court's conclusion, like the companies' position, was also untenable.

Accordingly, I would remand the question of whether the companies willfully failed to comply with FCRA to the district court for further proceedings. I respectfully dissent as to that portion of the opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695 & 04-35279

JASON RAY REYNOLDS, ET AL.,
Plaintiffs-Appellants,

V.

HARTFORD FINANCIAL SERVICES GROUP, INC., ET AL.,
Defendants-Appellees,

AJENE EDO,
Plaintiff-Appellant,

V.

GEICO CASUALTY COMPANY,
Defendant,

AND

GEICO GENERAL INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

[Argued and Submitted Mar. 8, 2005]

[Filed Jan. 25, 2006]

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i),

1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.

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[1] Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir.1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that ac-

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[2] We do not intend this list to be exhaustive.

tion, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, 2004 WL 2731226. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, de-

fendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge

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[3] Rausch is no longer pursuing his appeal.

[4] Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F.Supp.2d 1307, 1317 (D.Or.2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a

top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the factfinder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each in-

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[5] In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

surance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n.5, *supra*. Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a

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[6] Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F.Supp.2d 1213, 1222 (D.Or.2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F.Supp.2d 977, 989-90 (D.Or.2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks

whether he may use the customer's credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the

weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable – the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was not GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the

"neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

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[7] The related cases are resolved by memoranda of disposition filed concurrently herewith.

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford, refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor – such as adverse credit information, age, or driving record[8] – regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) (defining "increase" as "growth, enlargement,

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[8] An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir.2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions – from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the

"[a]ccuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir.1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate

was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-

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[9] We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[10] Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate

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[11] We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

[12] Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n.5, *supra*. Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "[t]he term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added).

Reporting that an agency cannot obtain any information regarding a consumer or that a consumer has insufficient

credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific re-

quirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir.1983) (requiring disclosure of "reliance on data contained in [a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "[t]he Hartford's eligibility and pricing decisions are based in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

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[13] The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

[14] We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates – the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a pol-

icy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only to the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because hold-

ing several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA, as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Compa-

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[15] While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that

nies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in

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increased Edo's and Reynolds' rates, respectively. (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir.2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir.2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir.2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir.1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir.1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir.1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring "'a motivation to injure'"). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

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[16] "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n.13, 108 S.Ct. 1677 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S.Ct. 533, 82 L.Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196, 118 S.Ct. 1939 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S.

192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the action violates the rights of consumers or in reckless dis-

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[17] The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("[W]ilful noncompliance under section 1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

regard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir.1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir.1989) (stating that "seeking legal advice [does not] ipso facto establish[] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below average. Fur-

thermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason. Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and

remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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[18] We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prod., Inc.*, 236 F.3d 487, 494 (9th Cir.2000).

STATUTORY PROVISIONS INVOLVED

The Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, provides in relevant part:

15 U.S.C. § 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. § 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer Report. –

(1) In general. – The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for –

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

(2) Exclusions. – Except as provided in paragraph (3), the term "consumer report" does not include –

(A) subject to section 1681s-3 of this title, any –

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) or (x) of this section.

(3) Restriction on sharing of medical information. – Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is –

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) Medical Information. – The term "medical information" –

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to –

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) Definitions Relating to Child Support Obligations.

(1) Overdue support.

The term "overdue support" has the meaning given to such term in section 666(e) of title 42.

(2) State or local child support enforcement agency.

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse Action. –

(1) Actions included. – The term "adverse action" –

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means –

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is –

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. – For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

***(l)* Firm Offer of Credit or Insurance.** – The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness or insurability, as applicable, that are established –

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification –

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was –

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or Insurance Transaction That Is Not Initiated by the Consumer. – The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of –

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. – The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded Communications. – A communication is described in this subsection if it is a communication –

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of –

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which –

(A) the consumer who is the subject of the communication –

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication –

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which anaction is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer Reporting Agency That Compiles and Maintains Files on Consumers on a Nationwide Basis. – The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) Definitions Relating to Fraud Alerts –

(1) Active duty military consumer. – The term "active duty military consumer" means a consumer in military service who –

(A) is on active duty (as defined in section 101(d)(1) of title 10) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) Fraud alert; active duty alert. – The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that –

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) Identity theft. – The term "identity theft" means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.

(4) Identity theft report. – The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report –

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) New credit plan. – The term "new credit plan" means a new account under an open end credit plan (as defined in section 1602(i) of this title) or a new credit transaction not under an open end credit plan.

(r) Credit and Debit Related Terms –

(1) Card issuer. – The term "card issuer" means –

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) Credit card. – The term "credit card" has the same meaning as in section 1602 of this title.

(3) Debit card. – The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) Account and electronic fund transfer. – The terms "account" and "electronic fund transfer" have the same meanings as in section 1693a of this title.

(5) Credit and creditor. – The terms "credit" and "creditor" have the same meanings as in section 1691a of this title.

(s) Federal Banking Agency. – The term "Federal banking agency" has the same meaning as in section 1813 of title 12.

(t) Financial Institution. – The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of title 12) belonging to a consumer.

(u) Reseller. – The term "reseller" means a consumer reporting agency that –

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) Commission. – The term "Commission" means the Federal Trade Commission.

(w) Nationwide Specialty Consumer Reporting Agency. – The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to –

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) Exclusion of Certain Communications for Employee Investigations –

(1) Communications described in this subsection. – A communication is described in this subsection if –

(A) but for subsection (d)(2)(D) of this section, the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of –

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory or-

ganization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and

(D) the communication is not provided to any person except –

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 1681f of this title.

(2) Subsequent disclosure. – After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) of this section an investigative consumer report need not be disclosed.

(3) Self-regulatory organization defined. – For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 78c(a)(26) of this title), any entity established under title I of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7211 et seq.], any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

15 U.S.C. § 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall –

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically –

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right –

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general. – Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate. –

(A) Duties, generally. – If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall –

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described. – An action referred to in subparagraph (A) is an adverse action described in

section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1681a(k)(1)(B) of this title.

(C) Information described. – Information referred to in subparagraph (A) —

(i) except as provided in clause (ii), is information that –

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include –

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on basis of information contained in consumer files

(1) In general. – Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section

1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that –

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

(2) Disclosure of address and telephone number; format. – A statement under paragraph (1) shall –

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file. – A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected. – This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines. – The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title –

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers

or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures –

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts. – In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies

and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements. – Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general. – No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 1681c-2 of this title has resulted from identity theft.

(2) Applicability. – The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction. – Nothing in this subsection shall be construed to prohibit –

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter) on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the

person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall –

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general. – Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing. – The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions. – No notice shall be required from a person under this subsection if –

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient. – A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice. – A notice under this subsection shall, at a minimum –

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 1681a(p) of this title).

(6) Rulemaking

(A) Rules required. – The Commission and the Board shall jointly prescribe rules.

(B) Content. – Rules required by subparagraph (A) shall address, but are not limited to –

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are

material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance. – A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions. – Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. – This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

15 U.S.C. § 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the

work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.